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REPORTS

OF

CASES IN CHANCERY,

ARGUED AND DETERMINED

IN

THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE

SIR JOHN ROMILLY, KNIGHT,

MASTER OF THE ROLLS.

BY

CHARLES BEAVAN, ESQ., M.A.,

BARRISTER AT LAW.

VOL. XXVII.

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

1858.

Nov. 15, 16.

HAWKSWORTH *v.* HAWKSWORTH.

A testator gave and bequeathed the "residue of his estate, after taking out 1,000*l.*," to his uncle. *Held*, that the residuary real and personal estate passed, the testator having previously made pecuniary gifts out of "his freehold and personal estate."

Gift of annuity, after the death of my mother, "or" the second marriage, death or forfeiture of my wife. The mother having predeceased the testator, *Held*, that the annuity was payable from the testator's death, and that "or" could not be read "and."

THE testator, *James Hawksworth*, by his will, dated in 1852, gave to his mother *the manor and fishery of Mappleton, &c.*, for life, "with an annuity of 80*l.*, to be paid out of his *freehold and personal estate*;" and he directed his mother's funeral expenses, under certain circumstances, to "be paid out of his *freehold or personal estate*." He gave to his wife, *Hannah Hawksworth*, 700*l.* absolutely, and he also gave her "an annuity of 40*l.* (being the interest of 1,000*l.*), to be paid out of his *freehold and personal estate*," with the use of his furniture during her widowhood or natural life. Likewise, he gave his wife, after the death of his mother, *the manor and fishery of Mappleton* "for and during her widowhood or natural life," with a proviso, which

1858.

HAWKSWORTH v. HAWKSWORTH.

which was as follows:—"That if my wife should either marry or cohabit with another after my decease, then the annuity, use of my furniture and the *manor of Mappleton* shall cease and be void. *Then, after the death of my mother, Hannah Hawksworth, or the second marriage,* death or forfeiture of my wife, *Hannah Hawksworth,* then I give and bequeath to my daughter, *Emma Green,* for and during the term of her natural life, an annuity of 40*l.*, and after her decease or second marriage, or if she cohabit with any one, then I give and bequeath the annuity left or enjoyed by her to my daughter *Emma Green's* two daughters, *Emma* and *Martha,* or any other children she may have, for the purpose of educating and bringing up the same children in the faith of the Established Church, and as they become of the age of twenty respectively, or on their marriage, each shall be entitled to a share of 1,000*l.*, the value of the annuity before devised and left to them; and if it should happen that the children of my daughter *Emma Green* should die, except one, then I will that such child shall have only one half 1,000*l.* and the remainder to devolve back to my family. I then make void and null from my wife, *Hannah Hawksworth,* the *manor and fishery of Mappleton* before devised and left to her, and I give and bequeath, after the death of my mother, *Hannah Hawksworth,* the *manor and fishery of Mappleton, &c.*, to *James Hawksworth* for life, and after his decease to his brothers in succession and their heirs for ever." He bequeathed some pecuniary legacies, and then proceeded in the following terms:—"*And the residue of my estate,* after taking out 1,000*l.*, the property of my late sister-in-law, *Rebecca Hawksworth,* if properly claimed, and if not claimed the said 1,000*l.* along with my residue, I *give and bequeath* to my uncle *Matthew* and his sons to be equally divided amongst them."

The

1858.

HAWKSWORTH v. HAWKSWORTH.

The testator died in 1856, and his mother predeceased him.

The suit was instituted by his widow and executrix for the administration of his estate. The first question which arose was, whether the words "residue of my estate" passed the real estate; and secondly, whether *Emma Green's* annuity was payable from the death of the testator, it being argued that the word "or" ought to be read "and."

Mr. *Bagshawe* and Mr. *C. C. Barber* for the Plaintiff:—*Cable* v. *Cable* (*a*); *Campbell* v. *Harding* (*b*).

Mr. *R. Palmer* and Mr. *Prendergast* for the heir-at-law:—*Wright* v. *Wright* (*c*); *Roberts* v. *Kerslake* (*d*); *Grove* v. *Young* (*e*).

Mr. *Selwyn* and Mr. *Little* for *James Hawksworth* and children.

Mr. *Plummer* for *Emma Green*.

The MASTER *of the* ROLLS.

Nov. 16.

I have looked at the will in this case, and I retain the opinion I expressed, that the whole of the property, real and personal, passed under the residuary clause.

But I am of opinion that it is not possible to accede to the argument with respect to the annuity to *Emma Green* and her daughters, and change the word "or" into "and."

(*a*) 16 *Beav.* 507.
(*b*) 2 *Russ. & Myl.* 390.
(*c*) 5 *Simons*, 449.
(*d*) 1 *Kay & J.* 751.
(*e*) 5 *De G. & Sm.* 38.

1858.

HAWKSWORTH v. HAWKSWORTH.

"and." The words are:—"Then after the death of my mother, *Hannah Hawksworth*, OR the second marriage, death or forfeiture of my wife *Hannah Hawksworth*, then I give and bequeath to my daughter *Emma Green*" an annuity of 40*l.* for life, &c., with reversion to her daughters. The argument has not induced me to come to the conclusion that the word "or" ought to be read "and," and that both the death of the mother and the failure of interest of the wife ought to occur before the annuity to the daughter takes effect. It would be to alter the gift, which is in the disjunctive form, and is to take effect whichever of the events specified may occur first.

I am of opinion that, in the events which have happened, the annuity of 40*l.* to the Defendant *Emma Green* is payable from the death of the testator (*a*).

(*a*) *Reg. Lib.* 1858, *A. fol.* 459.

BRUMRIDGE *v.* BRUMRIDGE.

Dec. 7.

The trustee indemnity clause does not exonerate a trustee from the consequences of a breach of trust.

THE Defendant *Thomas Brumridge*, and *John Peto* the younger, were the trustees of the marriage settlement of *George Bartholomew Brumridge* and *Frances* his wife, and certain trust funds were vested in them, in trust for the latter and their children. The trustees had power, with the consent of Mrs. *Brumridge*, to invest the trust funds "on good security of freehold, copyhold or leasehold estates, by way of mortgage, or upon trust for sale, either in *England* or *Wales*, or in government securities or parliamentary annuities or funds in *England*."

The settlement contained this indemnity clause:—"Provided always, and it is hereby further agreed and declared," &c., &c., "that the trustees shall be charged and chargeable only, every of them, for and with his and their own respective receipts and payments, acts and wilful defaults, and not otherwise; and that they shall not be charged or chargeable with or for any sum or sums of money, other than such as shall actually come to their respective hands by virtue of these respective presents (the joining in receipts for form sake notwithstanding); and that no trustee of these presents paying or consenting to the payment of money to a co-trustee thereof, with a *bonâ fide* intent to accelerate the performance of the trusts thereof, shall be responsible for the conduct or misconduct of the trustee receiving the same, nor answerable for his application or misapplication of such money, or any part thereof; nor shall

1858.

BRUMRIDGE v. BRUMRIDGE

shall any of the trustees, for the time being, of these presents, be charged or chargeable with, or for any loss or damage which shall or may happen in placing out all or any of the trust moneys on real securities, or in government or other public funds as aforesaid, or by depositing the same, or any part thereof, in any bank or banker's hands for safe custody, or by defect or insufficiency of any security or securities to be taken in pursuance of these presents, so as such securities be taken (during the life of the said *Frances Brumridge*) by and with her consent, as aforesaid, nor with or for any other loss or damage which shall or may happen in or about the execution of all or any of the trusts or powers aforesaid without the respective wilful default of such trustees or trustee."

This suit was instituted by the children against *Thomas Brumridge* (the trustee) and their parents, seeking to charge the trustee with breaches of trust, whereby the trust funds had been lost.

Thomas Brumridge said he took no more than a formal or nominal part in the trust, but he admitted that he had signed some receipts, which enabled the receipt of part of the trust money, but he did not sign them until his co-trustee had signed them. He relied on the trustee indemnity clause.

Mr. *Follett* and Mr. *Piggott* for the Plaintiff.

Mr. *J. H. Palmer*, for *Thomas Brumridge*, the trustee, argued that the terms of the trustee indemnity clause exonerated him from all liability in respect of moneys which had not actually come to his hands (*a*).

Mr.

(*a*) *See Mucklow* v. *Fuller Jacob*, 198; *Lewin on Trustees*, 317 (3*rd ed.*); *Fenwick* v. *Greenwell*, 10 *Beav.* 415; *Drosier* v. *Brereton*, 15 *Beav.* 221; *Dix* v. *Burford*, 19 *Beav.* 409; 22 & 23 *Vict. c.* 35, *s.* 31.

Mr. *Surrage* for the tenant for life.

The MASTER *of the* ROLLS.

I am of opinion that this clause does not exonerate a trustee from the consequences of any acts by which the money has been misapplied.

This clause is constantly brought forward to sanction the misapplication of trust moneys; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust.

Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say, that it is not his business to act properly in the performance of his duty as trustee. The Defendant is liable, because, by signing the receipt, he has enabled his co-trustee to obtain and misapply the trust money.

DECREE.

Accounts and enquiries were directed, and the decree proceeded as follows:—"In taking the accounts hereby directed, the Defendant *Thomas Brumridge* is to be charged with all money paid upon any receipt and authority which he has joined in giving or signing, notwithstanding the money so paid may not have actually come to his hands."—*Reg. Lib.* 1858, *A. fol.* 407.

1858.

WRIGHT *v.* STANFIELD.

Dec. 10.

An agreement to mortgage a *Middlesex* property does not come within the Registry Act; therefore, where the owner of property in that county had first mortgaged to *A.*, and then agreed to mortgage to *B.*, and had subsequently mortgaged to *C.*, and *C.* had registered, and *B.* had not: *Held*, that *C.* had not obtained priority over *B.*

IN *February*, 1857, *Ann Hughes*, being possessed of a leasehold in *Middlesex* for the residue of a term of ninety-one years, assigned it to Messrs. *Whitehead* by way of mortgage to secure 1,900*l.* This was duly registered.

In *May*, 1857, *Ann Hughes* agreed to assign the same leasehold premises to the Plaintiff Mr. *Wright* for securing 125*l.*, and she, at the same time, signed and delivered to him the following memorandum:—

"MEMORANDUM.—In consideration of your having this day advanced and lent to me the sum of 125*l.*, for which I have given you my warrant of attorney, I hereby agree to charge my leasehold houses, situate in *Grosvenor Street, Pimlico*, with the payment of the same. And I hereby undertake, at your request and at my own cost, to execute a proper assignment of the said premises, as you may direct," &c.

This memorandum was never registered.

Afterwards, in *November*, 1837, *Ann Hughes* assigned the leaseholds to the Defendant *Mary White*, by way of mortgage, for securing 600*l.* A memorial of this assignment was duly registered in pursuance of the 7 *Anne*, c. 20. Mrs. *White* had no notice of the second mortgage.

Under

1858.

WRIGHT v. STANFIELD.

Under these circumstances, the question was, whether Mrs. *Wright* had or had not priority over Mrs. *White*.

Mr. *R. Palmer* and Mr. *Southgate*, for the Plaintiff. The Plaintiff is the second incumbrancer on this property. The memorandum of *May*, 1857, did not require to be memorialized under the 7 *Anne*, c. 20, which only requires "a memorial of all deeds and conveyances," and of "all wills and devises in writing;" and by the 18th section, of all "judgments, statutes and recognizances." Again, they are to be registered "in such manner as hereinafter," that is, by the 5th and 6th sections, directed, the requirements of which, in this case, it was impossible to comply with. By the 5th section, the memorials "in case of deeds and conveyances" are to be under the hand and seal of the grantor or grantee, who is to prove "the execution of the deed or conveyance." This could not be complied with, in this case, for there was no grantor and no deed or conveyance. So, by the 6th section, the memorial is to contain the date of such deed or conveyance, and the parties to such deed or conveyance, and the witness, and every such deed or conveyance is to be produced to the Registrar. No part of this is applicable to the present case. In *Sumpton* v. *Cooper* (*a*) Lord *Tenterden* says, "As to the statute of *Anne*, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered." They also referred to *Sugden's Vendors* (*b*).

Mr. *Bardswell*, for the Assignees of the Mortgagor, asked for their costs.

Mr.

(*a*) 2 *Barn. & Adol.* 226. (*b*) *Page* 600 (13*th ed.*)

1858.

WRIGHT v. STANFIELD.

Mr. *Bernard*, for Mrs. *White*. The third mortgage, being registered, has priority over the second unregistered incumbrance. The Plaintiff's equitable mortgage ought to have been registered; it clearly comes within the mischief which the statute intended to prevent. The preamble says, "Whereas by different and secret ways of conveying lands," &c., "such as are ill-disposed have it in their power to commit frauds," &c. . . "by prior secret conveyances and fraudulent incumbrances." An equitable mortgage is, perhaps, more within the mischief referred to than a legal one. It has always been considered necessary to register equitable mortgages, and there is no difficulty in regard to the form of memorial. In *Rigge* there is a precedent for such a registration, which shews not only the practice, but the possibility of doing so. *Sumpter* v. *Cooper* is inapplicable, for it was a case of a deposit of deeds and not of a written agreement (*a*).

The MASTER *of the* ROLLS.

I think it clear that the Registry Act does not require the registration of a memorandum like that given to the Plaintiff.

I must make the usual decree.

(*a*) 9 *Jarman's Byth.* 693 (*3rd ed.*)

NOTE.—*See Moore* v. *Culverhouse* (*M. R.* 31 *Jan.* 1860), *post.*

1859.

ST. ALBYN *v.* HARDING.

Feb. 11, 14.

Purchase of a reversionary estate tail of a person without issue set aside merely for inadequacy of consideration, there being no fraud or pressure, and with costs, the purchaser having resisted the relief; but he was ordered to pay those occasioned by his unfounded allegations of fraud.

When sales of reversionary interests are set aside from mere inadequacy of consideration, it is upon the repayment of the consideration with interest at the rate of 5*l.* per cent.

IN 1838, the Plaintiff, *Lancelot St. Albyn*, was tenant in tail in remainder, expectant on the decease of his father, *Langley St. Albyn*, of certain estates in the county *Somerset* and *Devon*, with divers remainders over. The Plaintiff's age was twenty-seven and his father's fifty-two. The rental was about 800*l.* a year, and the value of the fee-simple about 40,000*l.*

In 1838, the Defendant, Mr. *Harding*, became the purchaser of the Plaintiff's estate, which, by a deed of the 2nd of *October*, 1838, was conveyed to him and his heirs, so as to transfer a base fee. The consideration was, 500*l.* paid down, and a further sum of 500*l.* payable on the death of the Plaintiff's father, and an annuity of 100*l.* to commence on the decease of the Plaintiff's father, and to continue during the Plaintiff's life.

The concurrence of the Plaintiff's father (the protector of the settlement) could not be obtained, and the Plaintiff covenanted, that on his father's death, he and his heirs would bar the entail and convey the estate to the Defendant in fee simple. After this, the Defendant (who had been educated at *Oxford*) had become so reduced, as to be compelled to earn his living by driving the *Richmond* omnibus.

In 1856, the Plaintiff signed an agreement to confirm the previous transaction, on payment to him of an additional

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additional sum of 2,000*l.* and of an additional annuity on the death of his father; but this was not carried into effect by the necessary deeds, for, on the 11th of *August*, 1857, the Plaintiff instituted this suit to set aside the deed of the 2nd of *October*, 1838, and the agreement of the 30th of *August*, 1856, on repayment of what had been advanced with interest.

The Plaintiff had never been married, and by his death in his father's lifetime, the interest purchased would be lost.

Mr. *R. Palmer* and Mr. *Karslake*, for the Plaintiff, relied on *Edwards* v. *Burt*(*a*); *Gowland* v. *De Faria* (*b*), and *Salter* v. *Bradshaw* (*c*).

Mr. *Selwyn* and Mr. *Welford* for the Defendant.

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Considering the view in which the Court of Chancery always regards cases of this description, it is impossible that this transaction can stand.

Here is a case of an estate of which the exact rental, though not very clearly proved before me, seems to be 800*l.* a year, independently of the mansion-house. The evidence of four surveyors has stated it to be worth, on an average, something like 40,000*l.* The tenant in tail in remainder of the estate, in the year 1838, his father being twenty-five years older than himself, sells the reversion of his estate for a sum of 500*l.* It is truly said on behalf of the Defendant, that the conversion of

(*a*) 2 *De G., M. & G.* 55.
(*b*) 17 *Ves.* 20.
(*c*) 26 *Beav.* 161.

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of the Plaintiff's estate into a base fee, if he had no male issue, would be no better than a life estate, and that it did not seem that he was likely to marry, and that in fact he never did marry; but on the other hand, the covenant to bar the remainder in tail is just as good as an estate in fee, because it could be turned into one should he survive his father; and that part of the agreement by which the purchaser, in the event of coming into the estate, is to pay to the Plaintiff 500*l.* more and an annuity of 100*l.* a year, is not to be taken into consideration, because it is only to be paid in the event of the Defendant getting possession of an estate worth 40,000*l.* The transaction may therefore be considered as nothing more than the sale of a reversion in fee in a property worth 40,000*l.*, taking the chance of the vendor surviving his father, the son being twenty-seven and his father fifty-two. I am of opinion that the evidence of the Defendant entirely fails in shewing that the son had not a good insurable life in the year 1838, and that it is impossible that this transaction can be allowed to stand. Even the Defendant himself seems to have thought it was desirable that the matter should be confirmed at a subsequent period.

It is not necessary to refer to the numerous authorities on the subject. In *Edwards* v. *Burt* (*a*), I erroneously proceeded upon the ground, that where the transaction was *bonâ fide* on the part of the purchaser of a reversion, and who had fairly endeavoured to ascertain and to give the full value of the property, then that the transaction would stand, although he did not strictly prove to the Court that he had given the full value. But the Lords Justices were of a different opinion

(*a*) 2 *De G., M. & G.* 55.

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opinion, and I am quite sure that they came to a right conclusion on the subject, and that the burthen of proof is strictly on the purchaser. Here the Defendant's own witness disproves his case. The witness most favorable to him states, that the life estate in reversion would be worth one year's purchase and one-tenth more. Now, without saying whether this is a large or a small estimate, he, at all events, says it is worth 900*l.*, yet the sum given was only 500*l.* All the other four witnesses value the interest purchased at sums varying from 5,000*l.* to 6,000*l.* or 7,000*l.* The consequence is, that the Defendant's case is not proved but actually disproved: and it is established, in the clearest manner, that nothing like the value was given for this reversionary interest.

Then the only question is, upon what terms the transaction should be set aside. This is also clear: I must set it aside on payment of the principal sum of 500*l.*, and interest at 5*l.* per cent. That is the rule in all transactions of this description.

It must be on payment of the costs of the Defendant up to the time of filing the bill; but since the bill was filed, the case stands on quite a different footing. There is no imperative rule in these cases. The Court deals with each case in reference to its circumstances. I do not accede to the view taken by Mr. *Welford*, that this is to be treated as the redemption of a mortgage. It would have been so, undoubtedly, if the Defendant had said "I am willing to be redeemed on repayment to me of principal, interest and costs" and as if you had filed a bill to redeem on that footing. That was the way in which the Plaintiff was desirous to treat the matter before he filed the bill. He said, "I will pay you principal, interest and costs."

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That is rejected, or, more strictly speaking, not accepted. The Defendant merely says, "If you intend to make a tender, the better way will be that you should produce the money." But if costs were to be paid, no tender could be made until those costs had been ascertained. A tender, therefore, was out of the question; and, in my opinion, the general costs of the suit must be paid by the Defendant, or else it would be impossible for a Plaintiff, in such a case, to avoid coming into the Court of Chancery, though he offers to comply with the very terms and conditions upon which he is entitled to relief in this Court.

At the same time, I entirely disapprove of the charges made in the bill as to fraud; I am of opinion that no case of fraud or pressure is made out. I am, therefore, of opinion that the Defendant must pay the Plaintiff the general costs of the suit, and that the Plaintiff must pay the Defendant the costs so far as they relate to the charges of fraud or undue pressure.

NOTE.—*See Bromley* v. *Smith*, 26 *Beav.* 644.

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Re COLSTON'S HOSPITAL.

Feb. 19, 21, 24.

A charitable foundation, established in 1701, for the support and education of boys, was fixed by the founder in the middle of the City of *Bristol*. The Court, on its appearing beneficial, sanctioned its removal to the vicinity outside the city, and authorized the purchase of a site for that purpose, notwithstanding a great opposition.

THIS was an application made by a majority of the trustees of *Colston's Charity*, with the sanction of the Charity Commissioners, for leave to remove *Colston's School* from its present site, in the city of *Bristol*, to a situation at *Stapleton*, in the vicinity, and for leave to purchase an estate for that purpose.

The minority of the trustees opposed this application, and applied by summons for leave to be heard.

To determine the question, the summons of the opposing minority was adjourned into Court in the first instance. The facts were these:—

In 1701, *E. Colston* established a hospital or charity in the city of *Bristol*, for the maintenance, clothing and education of 100 poor boys, and for placing them out apprentice, and he conveyed to the *Merchant Venturers' Company* a mansion-house in *St. Augustine's Back*, in the city of *Bristol*, for that purpose, which had been ever since used and was called *Colston's Hospital*. At the hearing of the *Attorney-General* v. *The Merchant Venturers' Company* (*a*), there being a large surplus income, a scheme was directed.

The Master made his report in 1853, whereby he proposed that the buildings should be enlarged, and that the surplus income should be applied in bringing up forty additional

(*a*) 5 *Beav.* 338.

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additional boys. Before any proceeding had been taken in that respect, a mansion and estate, called *Stapleton Court*, in the neighbourhood of *Bristol*, formerly the palace of the *Bishop of Bristol*, was offered for sale by the Ecclesiastical Commissioners, and the mansion and about nine and a half acres of land, and a bathing place near the river, could be purchased for 6,000*l.* It was proposed by the *Merchant Venturers' Company* that the purchase should be effected, and that the mansion-house should be altered so as to adapt it to the uses intended, at an expense of about 3,000*l.* They proposed that this sum of 9,000*l.* should be paid out of the existing surplus funds of the charity and the produce of the sale of the site of the present hospital, and that the residue should be raised by a mortgage, to be paid off in twenty years by means of a sinking fund.

The house at *Stapleton* was distant about two miles and three-quarters from the centre of the city of *Bristol*, and three miles from the present school premises, but it was only one mile distant from the present boundary of the city.

As a reason for the proposed removal, it was stated, that the present premises were inconvenient and confined, and insufficient for the due recreation of the boys, and that the latter objection would not be removed even by the total re-erection of the present buildings, and by the purchase of adjoining premises known as *Salem Court*, at a cost of from 10,000*l.* to 11,000*l.* It was also alleged, that many parts of the immediate neighbourhood of the school were of the worst character, and that the noise, in its present situation, was very objectionable.

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The proposal was objected to by fourteen dissentient members of the Corporation, four of whom were feoffees of the charity estate. Memorials had been presented against the removal, one to the Charity Commissioners by some of the inhabitants of *Bristol*, and others to the Attorney-General by eighteen beneficed clergymen of the city, and by the representatives of the *Colston* family. They insisted that an old school, founded and permanently fixed by *Colston* in *Bristol*, with which city he wished his name to be associated, ought to remain on its original site. That it was contrary to the founder's intention, and would be injurious to the city of *Bristol*, for the benefit of whose inhabitants it was founded, to remove it to a distance, and that it would also be prejudicial to the objects of the Charity, for the school would be removed from the observation of the beneficed clergy of the city, the approval of a majority of whom was required by the foundation deed on the appointment of the master of the school, and that its management and supervision would become neglected, in consequence of its distance from the residences of the active trustees.

The opponents denied the costs of altering the present buildings, the insufficiency of the play-ground, its confined situation and the alleged bad character of the neighbourhood, and they insisted that no case had been made out shewing the necessity of a removal, and, therefore, that such removal would be a breach of trust. They said, that even without the purchase of *Salem Court* a good and sufficient site would be obtained.

Mr. *Follett* and Mr. *Osborne* in support of the proposed removal.

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Mr. *Barber* for the nominees.

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Mr. *R. Palmer*, for the dissentient trustees and others, in opposition to the scheme. It would be a direct violation of the wishes and intention of the testator to remove the school out of the city of *Bristol*. It appears clearly, from the trust deed, that he intended the city of *Bristol* to be the place in which the hospital should for ever exist; he himself selected and appropriated the site, and directed that the Great House of *St. Augustine's Back* should be used "for ever after" for the purpose of the charity, his intention being to connect his name with that locality. The objects of his bounty were to be poor boys of *Bristol*, and there would be great danger of changing the character of the charity and the class of boys, by the removal to a Bishop's Palace and by the introduction of luxuries inconsistent with the position of poor boys. Another great danger is, that if this scheme be sanctioned, it will furnish a precedent which would equally apply to all the public schools and colleges in the kingdom. The supervision of the trustees would, by a removal of the school to an inconvenient distance, become relaxed, and the interests of the charity neglected, for the trustees could not be expected to attend with regularity at such a distance. Sufficient additional accommodation might be obtained by purchasing the property adjoining the present hospital, and the expenditure now proposed will cripple the resources of the charity and prevent the increase of the number of scholars, which is an object of the greatest importance.

Mr. *Terrell* for the *Attorney-General*.

Mr. *Follett* in reply.

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The MASTER *of the* ROLLS, in substance, observed, that the paramount consideration with the Court, in all cases of this description, was, what was most for the benefit of the charity.

That though the present situation was shown to be by no means an unhealthy one, still there could be no doubt, that it would be more beneficial to the boys to be in a perfectly airy situation, with greater space and accommodation. In addition to this, there appeared to be great difficulties in increasing, on the present site, the accommodation necessary for admitting an additional number of boys, for they seemed to be already cramped for room, and a future increase in the number of the boys would become impracticable in the present situation. That it appeared, by the evidence, to be for the benefit of the boys that they should have more light, air and space, and greater opportunity of enjoying them, which would not only tend to the improvement of their health, but was also important in a moral point of view; and it was not proposed to alter the present mode of living of the boys. That it might be beneficial for the boys to continue to attend the anniversary of the founder in the city of *Bristol;* but that was a matter which might be arranged in settling the scheme, which this removal would not prevent.

His Honor said, that he was impressed with the fact, that the proposal was approved of by a large majority of the most active trustees of the charity, and that the opposition of the inhabitants, on the ground of its being injurious to the city of *Bristol,* however laudable, ought not to influence the Court when opposed to the interests of the charity.

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On examining the estimates and the state of the funds of the charity, he thought that their present condition would justify the adoption of the course proposed, and he would therefore authorize the trustees to carry it into execution.

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March 2, 3.

A bill was filed against the Scotch executors of a domiciled Scotchman, to set aside a sale to their testator of shares in a Scotch company, and to make them account for the dividends received by the testator thereon. *Held*, on demurrer, that the suit could not proceed in the absence of a legal personal representative of the testator, duly constituted in *England*. *Held*, also, that the objection could not be removed by appointing a person to represent the estate under the 15 & 16 *Vict.* c. 86, s. 44.

THE bill in this case alleged, that in 1839, the Plaintiff, Mrs. *Maclean*, had sold and transferred ten shares in the *Carron Company* to *Joseph Dawson*, the manager of the company at *Carron*, in consideration of 5,625*l*. That the Plaintiff had sold them in reliance on the information furnished to her by *Joseph Dawson* as to the value of the shares; but that in 1858, she had discovered that the shares were, at the time of the sale, worth more than three times the sum for which she had sold them. That *Joseph Dawson* had conspired with the assistant-manager at *Carron*, and *Stainton*, the *London* manager, in concealing the true value of the shares, by rendering false and fraudulent accounts and by appropriating the moneys of the company to their own use, of which the bill specified very gross and glaring instances (*a*).

Joseph Dawson, who was domiciled in *Scotland*, died in 1851, and by his will, in the Scotch form, he appointed the Defendants, *William Dawson*, *Henry Dawson* and *Thomas Dawson* his executors, and he gave them the residue of his estate heritable and moveable. They proved the will in *Scotland*, but there did not appear

(*a*) *See* 24 *Beav.* 346.

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appear to be any legal personal representatives appointed in *England.*

The bill stated, that *Joseph Dawson* possessed seventy *Carron* shares at his death, that the executors had "paid all his funeral and testamentary expenses, and had provided for the execution of the trusts contained in his will, and that after so doing, these seventy shares formed a part of the residue of his estate, which was divisible amongst" the executors as residuary legatees. That the seventy *Carron* shares had been divided amongst them, and were now standing in their names, and that the remaining residuary estate had also been divided equally between them.

The bill asked, first, a declaration that the purchase of the ten shares by *Joseph Dawson* was fraudulent and void, that it might be set aside, and that his executors might be ordered to transfer ten shares to the Plaintiff. Secondly, that an account might be taken of the dividends and bonuses since the transfer to *Joseph Dawson*, and if the amount exceeded the purchase-money and interest thereon at 4*l.* per cent., then that the executors might pay the amount to the Plaintiff, who offered, in the contrary event, to pay the difference.

To this bill *Henry Dawson* filed a demurrer.

Mr. *Rolt*, Mr. *Follett* and Mr. *Cotton*, in support of the demurrer, argued that this suit could not proceed in the absence of a legal personal representative of *Joseph Dawson* duly appointed in *England*, and that it was evident that the Plaintiff could not obtain the relief sought, without taking the accounts against and in the presence of such legal personal representative, and after providing

providing for payment of the other claims on the estate of the testator.

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Mr. *R. Palmer*, Mr. *Selwyn*, and Mr. *John Pearson*, in support of the bill, argued that the estate having been administered in *Scotland*, the Plaintiff could follow the property in the hands of the Defendants as legatees, and that if a representative should be necessary, the Court had, under 15 & 16 *Vict.* c. 86, ss. 44, power to appoint a person to represent the estate. *Tyler* v. *Bell* (*a*); *Silver* v. *Stein* (*b*); *March* v. *Russell* (*c*); *Turner* v. *Letts* (*d*); *May* v. *Biggenden* (*e*); *Heath* v. *Percival* (*f*); *Sutherland* v. *De Virenne* (*g*), were cited.

The MASTER *of the* ROLLS, without calling for a reply, said:—

I do not see how the Plaintiff can get over this objection. If the Plaintiff should succeed and obtain a decree making the residuary legatees personally liable to restore these ten shares, then the bill goes on to pray an account of the dividends and bonuses which have accrued in respect of these shares since they were transferred to the Defendant's testator, that interest may be calculated upon the purchase-money at the rate of 4*l.* per cent. per annum, and that if the amount of the dividends and bonuses which have accrued in respect of the said shares shall be greater than the amount of the purchase-money together with the interest, then that the Defendant may pay to the Plaintiff the difference between such amounts, the Plaintiff offering, if it should be less, to pay the amount which is less.

Now,

(*a*) 2 *Myl. & Craig.* 89.
(*b*) 1 *Drew.* 295.
(*c*) 3 *Myl. & Craig.* 31.
(*d*) 20 *Beav.* 185; 7 *De G., M. & G.* 243.
(*e*) 1 *Sm. & Giff.* 133.
(*f*) 1 *P. Wms.* 682.
(*g*) 2 *Jur. N. S.* 301.

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Now, assuming that the Plaintiff is entitled to this relief, it necessarily follows, that an account will be taken of all the dividends and bonuses which have been received upon those ten shares by *Joseph Dawson* down to his death, and the Defendants, his executors, would be liable (to the extent of assets received by them) for the amount when ascertained, as a debt due from the testator's estate. But, unless they admit assets, it would not be possible for me to grant that relief, without directing an account of their receipts, or a general account of his estate, and directing an inquiry as to debts, and advertisements for the other creditors to come in and to prove against the estate. It would, in fact, be necessary for me to make a decree to administer that estate before I could declare the Plaintiffs creditors by simple contract of the testator for the amount of the bonuses and dividends upon the shares. This cannot be done in the absence of a legal personal representative duly constituted in *England*.

This is not the case contemplated by the 44th section of the 15 & 16 *Vict.* c. 86, and that seems to have been distinctly stated by Sir *Richard Kindersley* in *Silver* v. *Stein* (*a*).

I think, in this case, that I cannot proceed without having the legal personal representative before the Court.

I express no opinion on the other questions, but will allow the demurrer with liberty to amend.

(*a*) 1 *Drew.* 295.

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March 3.

As to the extent to which the Court will enter into the merits, on an application to serve its process out of the jurisdiction, and on an application to discharge such an order.

The Court will not, on a motion to discharge an order for service abroad, enter into the question whether the matter can be better decided in a suit there than in this Court. Such a question ought properly to be raised after appearance.

THIS suit was instituted by Colonel and Mrs. *Maclean*, to set aside a purchase of ten shares in the *Carron Company*, under the following circumstances:— The *Carron Company* was a Scotch Corporation, whose business consisted in manufacturing iron from the ore, and making various articles out of the iron so manufactured. The works were in *Scotland*, but they had agencies for the sale of their goods in *London* and *Liverpool*.

The Plaintiff, Mrs. *Maclean*, alleged, that in 1839, before her marriage, she had sold ten shares in the company to *Joseph Dawson*, the manager at *Carron*, at one-third their actual value, upon misrepresentations made by him as to their real value. The bill alleged, that *Joseph Dawson*, the manager in *Scotland*, and *Henry Stainton*, the manager and agent in *London*, had conspired together to conceal the true value of the shares from the Plaintiff and the other shareholders, in order that they might purchase them for themselves or their relatives, and enrich themselves and their families, and keep the control of the company in their own hands. It alleged as follows (para. 69):—"That *Joseph Dawson* and the Defendant *William Dawson* effected their object by the following fraudulent means, viz.: first, by omitting large sums belonging to the company from the accounts rendered to the company; secondly, by rendering false and fraudulent accounts to the company at their general meetings; thirdly, by the

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the appropriation by *Henry Stainton* of large sums belonging to the company to his own use, and fourthly, by the concealment of various sums which *Joseph Dawson* and the Defendant *William Dawson*, from time to time, appropriated to their own use, from the moneys belonging to the company."

It then stated sums of enormous amount omitted and misappropriated, and, amongst other things, the claims of the *Carron Company* against *Stainton*, referred to *ante* (*a*), which it stated had been ultimately compromised, by the executors of *Henry Stainton* paying to the company a sum of 220,000*l*. The Plaintiffs stated they had first discovered the fraud in 1858.

Joseph Dawson died in 1850, possessed of seventy shares, and this bill sought to rescind the sale to him of the ten shares, and have them and the dividends and bonuses thereon restored to the Plaintiffs Mrs. *Maclean* and her husband.

The Defendants to the bill were *Henry Dawson*, *William Dawson* and *Thomas Dawson* (the executors of *Joseph Dawson*), the two executors of *Henry Stainton*, and the *Carron Company*. All parties were resident in *England*, except *William Dawson* and *Thomas Dawson*, who were resident in *Scotland*.

On the 8th of *February*, 1859, the Plaintiffs obtained an *ex parte* order, giving them liberty to serve a printed copy of the bill on the Defendants *William Dawson* and *Thomas Dawson* in *Scotland*.

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(*a*) 24 *Beav.* 346.

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A motion was now made, on behalf of *William Dawson* and *Thomas Dawson*, that the order of the 8th of *February* might be discharged.

Mr. *Rolt*, Mr. *Follett* and Mr. *Cotton* in support of the motion. A Plaintiff is not, as a matter of right, entitled to an order for liberty to serve a Defendant out of the jurisdiction, under the 33rd Order of 8th of *May*, 1845 (*a*). It is purely a matter of discretion with the Court, and is to be exercised after an examination of the nature of the case and the position of the parties.

[*The* MASTER *of the* ROLLS expressed his opinion that the merits could not be entered into on such a motion, for if they could be, the Court (he observed) would be obliged to hear the merits of every cause in order to determine whether a Defendant ought to be served out of the jurisdiction.]

Mr. *Rolt*. If such an *ex parte* order were a matter of course, then any man resident in any part of the world out of *England* might compel another resident anywhere out of *England* to come and have his rights determined in the Court of Chancery. That could not have been the intention of the Legislature, and the Lords Justices appear to have been of a contrary opinion in *Innes* v. *Mitchell* (*b*).

The MASTER *of the* ROLLS.

After these cases I cannot help looking into the merits, though I have decided the contrary, and I still think

(*a*) *Ordines Can.* 297.

(*b*) 4 *Drew.* 141 *and* 1 *De G. & J.* 423; *see Meiklan* v. *Campbell*, 24 *Beav.* 100; *Whitmore* v. *Ryan*, 4 *Hare*, 612.

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think it a matter of great inconvenience to do so on such an occasion. A bill when filed states a *primâ facie* case, and bears the signature of counsel to it. If, when an order is made for the Defendant to appear, he is to be at liberty to come and say "I will not appear except for the purpose of trying whether the order for service ought to have been made," it is trying the case before the hearing; long affidavits may be filed as to merits, and the witnesses cross-examined at length on the mere question whether the order as to service ought to have been made. I have considered the principle and rule of Court to be, that where an order has been made on a Defendant to appear, then, if there be no technical objection, he is bound to appear, and he may then state any objection to the suit. I have so held on various occasions, and I think that a contrary practice would give rise to a vast amount of litigation and expense, the whole of which may prove unnecessary. I recollect when the bill passed, that this very objection was raised, viz, that one person living anywhere might cite another wherever resident, and if he should neglect to appear, a decree would be made against him. In spite of that, the Legislature thought it advisable to enable a Plaintiff to serve Defendants out of the jurisdiction, and the fears of the opponents to the measure have never as yet been realised.

Still, after these cases, I am bound to go into the merits.

Mr. *Rolt*, Mr. *Follett* and Mr. *Cotton*, on the merits, then insisted that this order ought not to have been made. They argued that the order being discretionary, the Court would, on examining the circumstances of this case, see, that this suit related to matters which would be

be more conveniently tried in *Scotland* than in *England*, and that it would be unjust to bring persons domiciled in *Scotland* to this country, in order to contest matters which ought properly to be determined by their own Courts. Here the shares were in a Scotch corporation, the contract complained of was Scotch, the testator *Joseph Dawson* was domiciled and died in *Scotland*, his will was Scotch and had been proved there alone, and the *quorum* of his executors were resident and his estate was locally situated there.

That there being no legal personal representative in this country, there could be no administration of his estate here. Besides, a decree here would be useless to the Plaintiffs, for it could not be enforced against the parties resident in *Scotland*.

That if the order were even right originally, still that the circumstances which had since occurred rendered it inexpedient that the suit should be prosecuted; for a number of similar suits of a like character being threatened, the executors in *Scotland*, in order to prevent the trust property being wasted by a multitude of separate suits, had raised, before the Court of Sessions in *Scotland*, an administration suit, for process of multiple-poinding, bringing into that Court the whole trust funds, and calling all parties, whether beneficiaries or creditors, including the present Plaintiffs, as defenders. That the testator's estate could only be properly administered in *Scotland* where the property was, where the testator was domiciled, where the contract was made and where the *quorum* of executors resided.

Mr.

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Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *John Pearson* were not called on.

The MASTER *of the* ROLLS.

I am of opinion that this motion fails. I apprehend that the sole question of discretion in cases of this sort is, whether, upon the facts appearing on the bill, and those brought to the attention of the Court on affidavit, it is a proper case for the Court to direct its process to be served out of its jurisdiction. The Defendant may afterwards apply to discharge that order, if it has not been made in accordance with the rules of the Court, or if it has been obtained by fraud. I have always considered, from the time the act passed, that the Court had no right to withhold the order if a *primâ facie* case was made out; but, of course, this leaves it open to the Defendant, as soon as he appears, to shew that the bill ought not to be prosecuted against him, or that the order has been obtained contrary to good faith; but it is out of the question, that this Court should take into consideration any subsequent facts. The question here is, whether, when the order was applied for, it was right, upon the facts stated on the bill and appearing on the affidavits. The subsequent proceedings in *Scotland* cannot affect the propriety of the exercise of the discretion of the Court, as to whether, at that time, it was right that the bill should be served there or not. I cannot conceive a case more likely to produce expense, litigation and loss to all parties, both of time and money, than where a Defendant, served out of the jurisdiction, is permitted to shew, by a series of affidavits, that it would be more convenient that the cause should not proceed in this country. I expressly refrain from expressing any opinion as to whether it is more desirable,

desirable, that this cause, or the litigation subsequently commenced in *Scotland*, should proceed; but I am of opinion that the Defendant cannot raise that question until he has appeared in the ordinary way, and has constituted himself an active party to this suit. The proper time to raise that question and to consider whether the rights of the parties may be better administered in *Scotland* will be, after he has entered his appearance, and in the consideration of that question, this Court will only be guided by what it may find to be most for the interest of the parties and the furtherance of justice. But a *primâ facie* case having been made out, it is new to me to be told that this Court ought not to have granted the order, if it had been informed, that there existed an intention of instituting certain summonses of reduction, and a process multiple-poinding in *Scotland* which would raise the whole question if left to that jurisdiction. The Court in such a case ought, I think, to say, "I express no opinion upon that subject, but the parties may raise that question after they have appeared." In my opinion, they cannot discuss that point upon a motion raising the question whether they ought or ought not to be served in *Scotland*, or whether the Court, in its discretion, has done right in allowing the Defendants to be served there. In fact, if the present contention were admitted, I see no reason why any Defendant, upon any service of process, might not be at liberty to raise the same question. A Defendant resident in this country, but also sued in *Scotland*, might come to set aside the service of the bill on him upon the ground that there was another suit in a foreign court which would much more conveniently dispose of the rights of the parties and of the questions in litigation between them. But the answer would be, that he has no *locus standi* to ask a decision on that point until he has appeared.

The

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MACLEAN v. DAWSON.

The discretion of the Court is solely to be exercised upon the facts appearing by the bill, always supposing that there is no question of fraud, which makes the service of the Defendants in a foreign country contrary to good faith or to any arrangement between the parties.

I am of opinion, therefore, that this motion must be refused with costs.

NOTE.—*Affirmed by the Lords Justices, 3rd May, 1859.*

Re JOB.

Re The NANTLE VALE SLATE COMPANY.

March 4.

An affidavit of personal service of an order for payment, under the Winding-up Acts, need not state where the service was effected.

A QUESTION argued in this matter was, whether an order for payment, under the Winding-up Acts, had been personally served on Mr. *Job*, and incidentally a point arose, whether the affidavit of the personal service ought not to state *where* the service had been made.

Mr. *Stiffe* for Mr. *Job*.

Mr. *R. Palmer* and Mr. *Dean, contrà*.

The MASTER *of the* ROLLS expressed a strong opinion, in the first instance, that, in an affidavit of personal service of an order, it was necessary to state where that service had been effected. But having been referred, by

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Re Jos.
Re
The Nantle Vale Co.

by Mr. *Murray*, the Record and Writ Clerk, to the 34th General Order of *May*, 1845 (*a*), as to the affidavit of service of bills and claims, and to *Veal's Record and Writ Practice* (*b*), he said, that it was impossible to treat this affidavit of service as irregular, though it might be desirable to regulate the future practice by a General Order.

(*a*) *Ord. Can.* 298, *and Consolidated Order* 10, *r.* 8.

(*b*) *Pages* 117—125 (*2nd ed.*)

KNOTT *v.* COTTEE. (No. 4.)

March 5.

Ordinarily, the conduct of a sale directed by the Court is committed to the Plaintiff; but when it appears for the benefit of the parties, it will be given to a Defendant. This right does not, however, depend on the extent of the interest of the parties in the property.

When a sale is directed, every party to the suit having the title deeds is bound to facilitate the sale.

IN this suit, Messrs. *Smith & Son* had acted for the Plaintiff *Ann Knott*, and the whole of the family, since the death of the testator in 1844.

In 1857, *Ann Knott* married Mr. *Payne*, whereupon they changed their solicitors in the suit. In *January*, 1859, the Defendant *George Knott* presented a petition for payment out of Court of part of the funds, to which he added a prayer for the sale of the property. The order for sale was made on the 29th of *January*, 1859. Afterwards, in chambers, an application was made by the Defendant *George Knott* for the conduct of the sale.

Mr. *R. Palmer* and Mr. *Hobhouse*, for *George Knott*, now argued, that it was proper that he should have the conduct of the sale, on the ground that he was the person principally interested in the property, being the absolute owner of four-sevenths of it, with a contingent interest

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KNOTT v. COTTEE. (No. 4.)

interest in the remainder, while the Plaintiff had only a limited interest in one-half of the remainder. Secondly, that as he had possession of the title deeds, and had, therefore, greater facilities in effecting the sale, he ought to be entrusted with the conduct of it.

Mr. *Lloyd, contrà*, was not heard.

The MASTER *of the* ROLLS.

There must be some rule as to the conduct of a sale, and it must necessarily be a technical one. Ordinarily, a Plaintiff has the conduct of the sale, but the Court will take it away from the Plaintiff, whenever it appears to be for the interest of the parties interested that he should not have it: but that case must be made out. It would be very detrimental to the interests of the parties, if, in every case, the Court had to discuss, on affidavit, whether it would be more beneficial that it should be conducted by one or other of the parties.

On the first point, therefore, I am of opinion, that the right to the conduct of a sale does not depend on the extent of the interest of the parties.

As to the possession of the title deeds, I think it does not affect the question, because it is the duty of every party to a suit to afford facilities to the sale (*a*). I think it is very desirable to avoid this species of squabble, which not only wastes a portion of the public time, but is not creditable to the profession. In the majority of cases, the solicitors alone are interested, and it in nowise tends to the benefit of parties themselves.

This case must follow the usual rule, and the Plaintiff must have the conduct of the sale.

(*a*) *Levesey* v. *Harding*, 1 *Beav.* 343.

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STRINGER *v.* GARDINER.

March 12.

A testator bequeathed a legacy to his niece, *E. S.* After her death, he made another will, in which the same bequest was copied. The latter alone was proved. The legacy was claimed by *E. J. S.*, a great-great-niece. *Held*, that she was entitled, and that parol evidence was inadmissible to shew that the deceased niece was intended.

THE last will of the testator, *Benjamin Tapley*, was dated in *January*, 1852, and, as proved in the Ecclesiastical Court, it contained the following bequests:—

"I give and bequeath unto *my niece*, *Elizabeth Stringer*, the sum of 20*l.* for mourning."

"As to all that my cottage and premises called *Rose* Cottage, upon trust for *my said niece Elizabeth Stringer*, her executors, administrators and assigns."

The testator died in *September*, 1856. Neither at the date of his will nor at his death had the testator any *niece* in the first degree of the name of *Elizabeth Stringer*, but the Plaintiff *Elizabeth Jane Stringer* was the grand-daughter of a niece of the testator named *Elizabeth Stringer*, who had died in *February*, 1848, and whose death was well known to the testator.

The Plaintiff, *Elizabeth Jane Stringer*, claimed the bequests as the person intended to be designated by the testator by the description of "my niece *Elizabeth Stringer*."

The Defendants, the executors, insisted that the person really intended by the testator was the deceased niece *Elizabeth Stringer*, and they adduced evidence to

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DATES.

1847, Revoked will.
1848, Death of *E. S.*
1850, Revoked codicil.
1852, Last will.
1856, Death, and legacy claimed by *E. J. S.*

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to shew, that the testator, in a former will made in 1847, in the lifetime of *Elizabeth Stringer*, had made the same gifts to her and in the same terms, and that these bequests had inadvertently been re-copied into the subsequent will of 1852, made after the decease of the niece.

The testator's solicitor, by his affidavit stated, that in 1847, the testator made a will, which contained gifts of 20*l.* and of *Rose* Cottage in favor of "his niece *Elizabeth Stringer*," in terms identical with those used in his will of 1852. That in 1850 the testator, in consequence of the misconduct of a grandson, executed a codicil to his will of 1847, whereby he revoked some devises and bequests in favor of such grandson. The solicitor's affidavit then proceeded as follows:—

In *January*, 1852, the testator, *Benjamin Tapley*, "called upon me and expressed a wish to renew the devises and bequests he had originally made in favor of his grandson, and to make other alterations in the disposition of his property (such alteration, however, having no reference whatever to the said bequests to *Elizabeth Stringer*), and he requested me to prepare a codicil to carry his intentions into effect. At this time, the memory of *Benjamin Tapley* was so far impaired, that I thought it unwise for him to make such alterations in his testamentary disposition, and in consequence of such opinions, and also with a view to do away altogether with the codicil of the 26th day of *January*, 1850, and thus keep out of sight, as far as possible, his grandson's misconduct, I recommended him not to make the proposed second codicil, but simply to execute a copy of his said will of the 26th day of *May*, 1847, with such few and slight alterations only as I knew were most needed, and *Benjamin Tapley* having assented to this,

I made the amendments in red ink, which now appear in the body of the said amended will, and a copy having been engrossed from such will as altered, *Benjamin Tapley* executed such copy as his last will and testament on the 13th day of *January*, 1852. When the said testator executed his second will, as hereinbefore mentioned, I was not myself aware that *Elizabeth Stringer*, the grandmother of the Plaintiff, was dead, or I should have called the testator's attention to the said bequests of 20*l.* and *Rose* Cottage, as two of those which pressed for consideration and alteration. No remark whatever was made to me by the testator in reference to the said bequests, and, as far as I can judge, I believe that neither the said bequests to the Plaintiff's father, nor the death of *Elizabeth Stringer*, once occurred to the testator, though I have no doubt, myself, that by *Elizabeth Stringer* being named in the will of the 26th day of *May*, 1847, the testator intended *Elizabeth Stringer*, the grandmother of the Plaintiff; and I believe that the bequest of the 20*l.* and of *Rose* Cottage to *Elizabeth Stringer* was allowed to remain in the will of the 13th day of *January*, 1852, entirely through forgetfulness and inattention on the part of the testator."

Mr. *R. Palmer* and Mr. *Lindley* for the Plaintiff: *Bernasconi* v. *Atkinson* (*a*); *Miller* v. *Travers* (*b*); *Newbolt* v. *Pryor* (*c*); *Bennett* v. *Marshall* (*d*); *Wigram on Extrinsic Evidence* (*e*).

Mr. *Selwyn* and Mr. *Dean* for the Defendants, cited *Selwood* v. *Mildmay* (*f*); *Doe* d. *Hiscocks* v. *Hiscocks* (*g*).

The

(*a*) 10 *Hare*, 343.
(*b*) 8 *Bing.* 244.
(*c*) 14 *Simons*, 354.
(*d*) 2 *K. & J.* 740.
(*e*) *Page* 169 (*4th ed*).
(*f*) 3 *Ves.* 306.
(*g*) 5 *Mee. & W.* 363.

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The MASTER *of the* ROLLS (*a*).

The Plaintiff is entitled to this bequest.

The rule as to the reception of parol evidence to explain a will is perfectly clear. In every case of ambiguity, whether latent or patent, parol evidence is admissible to shew the state of the testator's family or property; but the cases in which parol evidence is admissible to shew the person intended to be designated by the testator are those cases of latent ambiguity mentioned by Sir *James Wigram*, where there are two or more persons who answer other descriptions in the will, each of whom standing alone would be entitled to take. Here, if there had been another *Elizabeth Stringer* living at the date of the will, parol evidence would have been admissible, to ascertain who the person was the testator intended to designate; but in this case, the Court is asked to admit parol evidence, not for the purpose of explaining the meaning of the testator, but for the purpose of shewing that he had no meaning at all; in fact, for the purpose of expunging the words from the will altogether. To admit evidence for such a purpose would create alarm in the minds of testators, and introduce the greatest uncertainty in the construction of wills.

All that the Court has to do is, to see if the words of the will sufficiently clearly point to a particular person. If the evidence had gone to shew that the testator had never heard of any *Elizabeth Stringer*, that there was no such person related to him, and that the person who claimed was a mere stranger, the case would have been different. There was a person named *Elizabeth* related to the testator by blood, who may be

(*a*) *Ex relatione.*

be described as the great-great-niece of the testator, or the niece twice removed; but, in ordinary language, she might be described as the niece of the testator. The real and only question here is, whether the Plaintiff is entitled to take under the words "my niece *Elizabeth Stringer*," her full name being *Elizabeth Jane Stringer*. One conclusion alone can be arrived at, which is, that she is entitled.

NOTE.—The case was heard by the full Court of Appeal, on the 3*rd* of *July*, 1859, when the decree of the *Master* of the *Rolls* was affirmed, with costs.

CALDWELL *v.* ERNEST. (No. 1.)

THE OFFICIAL MANAGER OF "THE HOME COUNTIES METROPOLITAN FREEHOLD LAND SOCIETY" *v.* ERNEST.

March 16.

A suit was instituted by three members of a *Freehold Land Society*, on behalf, &c., against another member. The society was afterwards ordered to be wound up; and on the application of the three Plaintiffs, the name of the official manager was substituted as Plaintiff. The Judge would not allow the official

THIS suit was instituted in *February*, 1858, by *Caldwell*, *Watson* and *Ingram*, three members, "on behalf of themselves and the other members of *The Home Counties Metropolitan Freehold Land Society* against the Defendant *Ernest*," to compel him specifically to perform an agreement to purchase his allotted portion of the land purchased by the society, and afterwards distributed amongst its members.

The replication was filed on the 3rd of *November*, 1858; but on the 13th of that month, an order was made by Vice-Chancellor *Wood*, to wind up the company. On the 31st of *January*, 1859, on an application in the cause

manager to prosecute the suit, who then moved to stay proceedings therein, on such terms as the Court should think fit. The motion was refused with costs, to be paid by the official manager personally.

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cause made by the three Plaintiffs, an order of course was made at the *Rolls*, whereby it was ordered, "that the cause *should be prosecuted* by *Henry Croysdill*, as the official manager of the said company, by the style or designation of the official manager of *The Home and Counties Metropolitan Freehold Land Society*, as the nominal Plaintiff, for and on behalf of the said company." After this order the suit bore the second above-mentioned title.

The list of contributories had not been settled, the official manager had only 30*l.* in hand, and the Judge to whose Court the winding-up of the company was attached would not sanction the official manager's adopting and prosecuting the suit. It was intended to settle the rights and liabilities of the Defendant under the winding-up order.

Under these circumstances, notice of motion was given in the suit, on behalf of the Plaintiff, as follows:—"That notwithstanding the order of the 31st of *January*, 1859, the further prosecution of this suit be stayed, on such terms as this honorable Court shall think fit, or that such order may be made, in relation to the future prosecution of this suit, as may be just."

Mr. *Beavan*, in support of the motion. The *ex parte* order (made under the 53rd section of the 11 & 12 *Vict.* c. 45), which directs that the suit "shall be prosecuted" by the official manager is informal, and contrary to the 60th section of the statute, which says, that no suit shall be "proceeded with by the official manager, whether against a contributory of the company, or any debtor or stranger thereto, but with the leave" of the Judge. As the Judge will not authorize the official manager

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manager, it is impossible for him to proceed in this suit, which he has never adopted. Besides this, the rights of all parties may be determined under the 92nd section of the Winding-up Act, which was one of the principal objects of the legislature in passing it.

The suit ought therefore to be stayed on such terms as the Court may think just.

Mr. *Speed, contrà*, for the Defendant, was not heard.

The MASTER *of the* ROLLS.

The official manager must choose for himself, and either obtain the authority of the judge to go on with the suit, or he must abandon it. I cannot tie it up merely because it happens that the company has become bankrupt. This is a suit from which the Defendant is entitled to be relieved, and the motion must be refused with costs.

Mr. *Speed* asked that the official manager might personally be ordered to pay the costs.

Mr. *Beavan*. The suit is not that of the official manager, but of the company. He has no estate vested in him or under his control, and he can only act under the directions of the Judge in chambers. The 56th, 57th and 59th sections shew that the official manager, acting under the direction of the Court, is exonerated from all personal liability.

Mr. *Selwyn, amicus curiâ*, said the point had been decided by the Lords Justices in the case of *The Official Manager of The Grand Trunk Railway Company* v. *Brodie* (*a*).

The MASTER *of the* ROLLS.

The official manager must personally pay the costs.

(*a*) 9 *Hare*, 823; 3 *De G., M. & G.* 146.

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CALDWELL *v.* ERNEST. (No. 2.)

THE OFFICIAL MANAGER OF "THE HOME COUNTIES METROPOLITAN FREEHOLD LAND SOCIETY" *v.* ERNEST.

May 31.

After a winding-up order, the name of the official manager had been substituted for that of three members, who sued on behalf of themselves and the other members. A motion was subsequently made by the Defendant to dismiss for want of prosecution. The order was made, with costs to be paid by the Plaintiffs, and not by the official manager, who had not adopted the suit.

THE bill was filed in *February*, 1858, by three members of the above society on behalf of themselves, &c., and in *November* following, an order was made to wind up the society, and in *January*, 1859, the three Plaintiffs obtained an order of course to substitute the official manager as Plaintiff. The Judge to whom the winding up was committed would not give his sanction to the official manager's prosecuting the suit; he, therefore, moved to stay the proceedings, but the motion was refused with costs (*a*).

The Defendant afterwards entered into evidence, which closed on the 26th of *February*, but the official manager took no further steps.

The cause not having been set down to be heard, and no *subpœna* to hear judgment having been served, the Defendant now moved in this suit, intituled as above, that the bill might stand dismissed for want of prosecution, with costs. The notice of motion was served both on the official manager and on the three members in whose name it had been originally instituted.

Mr. *Selwyn* and Mr. *Speed*, in support of the motion, argued that the suit having been abandoned must be dismissed

(*a*) *See ante, p.* 39.

dismissed for want of prosecution, and that the costs must be paid by the present Plaintiff, namely, the official manager personally, who, by moving in the suit, had adopted it; *The Official Manager of the Grand Trunk Railway Company* v. *Brodie* (*a*). But that if the official manager was not liable, then that the original Plaintiffs ought to pay the costs.

They referred to 11 & 12 *Vict.* c. 45, s. 60.

Mr. *R. Palmer* and Mr. *Beavan*, for the official manager, were not heard.

The original Plaintiffs did not appear.

The MASTER *of the* ROLLS.

I am of opinion that if the official manager takes no steps in a suit, but repudiates it and does nothing, the mere act of the original Plaintiffs to the cause naming him as a party to the suit, in which he takes no part, does not make him personally liable for the costs. It is their business, and it is the suit of the company, and it is not to be taken from the fact of his substitution that the official manager means to prosecute it. I am of opinion, therefore, that he is not the person to pay the costs of this suit, on its dismissal for want of prosecution. If it were otherwise, the effect of substituting the official manager would be to transfer to him the liability for costs from the persons who instituted the suit. In regard to the case cited, the question is, whether the official manager has adopted this suit? The only thing he has done is this:—he has moved the Court to this effect:—

(*a*) 9 *Hare*, 823; 3 *De G., M. & G.* 146.

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effect:—to stay the suit altogether, or on such terms as the Court might think fit. I consider that, as a statement by him that he did not intend to take on himself any responsibility, that he would not carry on the suit except under the sanction of the Court, and that consequently he desired it to be stayed on such terms as the Court might think fit. I held, however, that the Court could not make that order, but that the official manager must act for himself, and I refused the motion with costs. But this act of the official manager, as far as it went, was a repudiation of the suit.

I am of opinion that the original Plaintiffs are liable for the costs, and as the Defendant has given them notice of this motion, I think he is entitled to an order to dismiss for want of prosecution with costs to be paid by the original Plaintiffs.

NOTE.—An arrangement having taken place in the winding-up, the Vice-Chancellor *Wood*, on the 16th of *June*, 1859, upon the motion of the Petitioners, ordered that the winding-up order should be discharged on the 24th of *June* next, the official manager in the meanwhile advertising in the *Gazette* and two other papers, that the order would be made, unless cause were shewn on or before that day.

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In re KNIGHT'S TRUSTS.

March 23.

A trustee is not, in all cases, justified in paying a trust fund into Court under the Trustee Relief Act, and where he does so without sufficient reason, he will be made liable for the costs of a petition for getting the fund out of Court.

The children of *A. B.* were entitled to a specific legacy under a will, and to a portion of a residue under a subsequent deed of compromise. *C. D.* was both the legal personal representative and the trustee of the deed. The legacy was paid to the two children on their attaining twenty-one, in 1839 and 1843, in a suit to which the trustee was a party; but the other fund remained unpaid and in the funds until 1858, when, the two sons being in the Austrian Military Service, the trustee paid the fund into Court under the Trustee Relief Act. *Held*, that he was not justified in so doing, under the circumstances, and he was ordered to pay the costs of a petition by the sons to obtain payment out of Court.

SIR *JOHN KNIGHT*, by his will, bequeathed a sum of 1,500 French *Rentes* to the children of his *late* son, Captain *Hood Knight*, equally, and he bequeathed the residue of his real and personal estate to his daughter, *Amelia Walker*.

The testator died in 1831, and in a suit afterwards instituted, the validity of the will was disputed. It, however, ended in a compromise, under which the will was proved by Mr. *Paddon* and Mr. *George Knight* (deceased). A deed dated the 2nd of *November*, 1832, to which Mr. *Paddon* and his co-trustees were parties, was executed, under which they were to hold the residue in trust to pay 4,000*l.* to *Amelia Walker*, and one-sixth of the surplus in trust for the children of the testator's son, *Hood Knight*, who should live to attain twenty-one, equally.

In 1834 the trustees, accordingly, in performance of the trust, invested the one-sixth of the surplus belonging to the children of *Hood Knight* in the purchase of 344*l.* 6*s.* stock.

There were two children of *Hood Knight*, namely, *John* and *Charles*, who were then both infants. A suit was instituted in their names against the administrators, to

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to secure their specific legacy of French *Rentes*, which was paid into Court in 1834, and invested. *John Knight* attained twenty-one in 1839, and his brother, *Charles Knight*, in 1843, on which respective occasions, their shares in the specific legacy were paid out of Court to them, upon their petitions, which were regularly served on Mr. *Paddon*. Their shares in the residue, being 344*l.* 6*s.* stock, seemed to have been overlooked at that time, and the dividends having remained unreceived, the stock was transferred to *the Commissioners for the Reduction of the National Debt*.

In 1858, Mr. *Paddon* applied for a retransfer into his own name, and the application was advertised by the Bank of *England* in the usual way. The fund was ultimately transferred into Mr. *Paddon's* name, who invested the arrears of dividends in the purchase of 204*l.* 6*s.* £3 per Cents. He, in *March*, 1858, caused application to be made to the mother of *John* and *Charles Knight*, stating that "it had lately been ascertained that they were entitled to a further sum," and inquiring for their address.

They were then in the Austrian military service, and their solicitor made application for information respecting the fund, to which no definite reply was made, further than that Mr. *Paddon* intended, on receipt of the money, to pay it into Court under the Trustee Relief Act, and that application would then have to be made to the Court by the parties entitled.

Mr. *Paddon*, accordingly, paid the fund into Court, and *John* and *Charles Knight*, having assigned the fund to their solicitor, Mr. *Murray*, with power to give receipts, this petition was presented in their names and in that

that of Mr. *Murray* to obtain payment of the fund, and the petition asked that the costs might be paid personally by Mr. *Paddon*.

Mr. *Selwyn* and Mr. *Murray*, in support of the petition, argued that the conduct of Mr. *Paddon* was vexatious, that he was both representative of the testator and trustee of the deed, and that the rights of the Petitioners having been ascertained, and payment of their legacy having been ordered in a suit to which Mr. *Paddon* was a Defendant, he must clearly have known that they were the persons entitled, under the deed of compromise, to the one-sixth invested for them. That there was, therefore, nothing doubtful, as to the title or identity of the Petitioners, which justified the trustee in refusing to perform the duty he had undertaken by the deed, and in putting the Petitioners to the expense of a petition in order to obtain payment. They cited *In re Woodburn's Trusts* (*a*); *In re Heming's Trusts* (*b*); *In re Jones* (*c*).

Mr. *R. Palmer* and Mr. *Freeling* for Mr. *Paddon*, argued that he was justified in paying the fund into Court, and was not bound, under the circumstances of this case, to take upon himself the responsibility of paying it over. That the act in question was intended expressly to relieve trustees from such a responsibility, and to discharge themselves by paying the money into Court. They complained that the affidavits on the part of the Petitioners went into facts unnecessary to establish their title, and they asked that the trustee's costs might be paid out of the trust fund.

The

(*a*) 1 *De G. & Jones*, 333.
(*b*) 3 *K. & J.* 40.
(*c*) 3 *Drew.* 679.

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In re KNIGHT'S TRUSTS.

The MASTER *of the* ROLLS.

If the trustee is to have his costs in this case, there could be no case in which he would not be entitled to have them, unless he had acted maliciously or fraudulently. It is impossible to conceive a more clear case than the present, or one in which the trustee was better aware of all the circumstances affecting it. He accepted a trust for the children of *Hood Knight*, and was a party to a suit in which it was proved, to the satisfaction of the Court and in his presence, who they were, and in which the Court accordingly ordered payment to them of their legacies. Here is a trustee for the children of *Hood Knight* of a particular sum; he had access to all the papers in the cause, and ready means of ascertaining who the children were. It was payable to them at twenty-one, and as the stock was purchased by him in 1832, he must in 1858 have known, that, if living, they were more than twenty-one, and were absolutely entitled to the fund. What was the duty of the trustee under these circumstances, was he not bound to perform his trust, and to ascertain whether they were living, and on proper evidence that they had duly appointed a person to receive it, to pay over the money?

In *Lowson* v. *Copeland* (*a*) the Court held, that an executor, having put the next of kin to prove their relationship, must pay the costs of so doing. In several other cases it has been held that an executor or trustee is not justified in putting a person to file a bill to establish his rights where they are clear. Here the only question was, whether the persons were living for whom the respondent was trustee; for he was perfectly well aware of the facts when he paid the money into Court. It is true they

(*a*) 2 *Bro. C. C.* 156.

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they are officers in the *Austrian* army, going about from place to place, but it was his duty to ascertain whether they were living, and to pay over the money to them, or to some person who had authority to receive it.

That is how the matter would stand in case a bill were filed. Does it make any difference that this payment was made under the act for the relief of trustees, and for the benefit of their *cestuis que trust*, and passed in order to enable trustees to pay a fund into Court, and discharge themselves without putting their *cestuis que trust* to the expense of a suit? The legislature did not intend that where the trust was clear, a trustee should pay the fund into Court. A trustee cannot pay money into Court merely to get rid of a trust he has undertaken to perform, and the act would lead to great oppression if it were otherwise. I had a case in which, after an administration bill had been filed, the trustee paid the fund into Court, and I afterwards made an order that the trustee should pay the fund into Court in the suit. I said that it was no answer that they had paid into Court under the act, and that it was necessary for them to pay it into Court in the suit; but I stated, that I would give them every facility for getting it transferred at their own expense. It is meant that where a person undertakes a trust, he shall perform it; he is not to say, "I do not require evidence, and will not look at any, but I will pay into Court." I admit that this differs from *Woodburn's Trust*, because, in that case, the trustees acted vexatiously.

It is said that the trustee acted upon the advice of counsel: I regret it, but that does not make any difference. In *Doyle* v. *Blake* (*a*) it was held, that such advice

(*a*) 2 *Sch. & Lef.* 231.

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advice could not exonerate them from the consequence of their acts.

It is then said, that no one objected to the trustee paying the money into Court. Even suppose that nothing had been said on the subject, then here is the case of a trustee who held a sum of money to which he knew two persons were entitled; he had nothing to do but to get a receipt from them for the money, instead of which he paid it into Court.

The trustee must pay the Petitioners their costs of this application, and consequent thereon, and I think I must give a direction to the taxing master to disallow any part of the Petitioners' affidavits, which he may deem unnecessary to establish their title to the order prayed (*a*).

(*a*) *Reg. Lib.* 1858 *A.*, *fol.* 1307.

Re CULLEN.

March 23, 24.

A solicitor received from his client a sum of money to pay off a mortgage. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest.

THE Petitioners, Mrs. *Russell* and Mrs. *Robson*, were the owners of some freehold houses in *Poplar*, which, in 1850, were taken by the *North London Railway Company*.

The Petitioners employed Mr. *Cullen* as their solicitor, in the place of Mr. *Barrett*, and it being necessary to raise money to pay off the debt due to Mr. *Barrett*, Mr. *Cullen* borrowed a sum of 500*l.* for the Petitioners, from a Mr. *Luff*, on mortgage of other property belonging to the Petitioners. There were difficulties in completing with the railway company, and the purchase-money for the property taken by them (650*l.*) was paid into Court.

The difficulties having been removed, Mr. *Cullen*, in *July* last, accompanied the Petitioners to the *Accountant-General's Office*, and received a draft for the money paid into Court, which, with interest, amounted to 700*l.*, The Petitioners gave the draft to Mr. *Cullen*, at his suggestion, for the purpose of paying off the mortgage to *Luff*.

In *September* last, the Petitioners discovered that *Luff* had not been paid, and they remonstrated with Mr. *Cullen*. He, however, refused to pay off the mortgage, insisting that he was entitled to retain the money in discharge of costs due to him from the Petitioners.

The petition in this matter was then presented, praying

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praying that *Cullen* might be ordered to return the draft or pay off *Luff*, and pay the balance to the Petitioners.

Mr. *Kay* in support of the Petition. A solicitor's lien upon money only exists when the fund has been recovered in a suit or other proceedings, and then only to the extent of the costs of such suit or proceeding. There was no lien here: the money was paid to the solicitor for a specific purpose, and there is no foundation for his claim of a lien upon it for his general costs.

Mr. *Parnell*, for *Luff*, raised no objection.

Mr. *Renshawe*, for *Cullen*, argued that the proper course for the client to take was, to obtain an order to tax the bill of costs due from the Petitioners to *Cullen*, and in the taxation, the cash account would be taken between them; and, secondly, that the solicitor had a right of retainer for his costs.

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I have rarely known a defence less satisfactory than that made by the Respondent. The state of the case is this:—These ladies received a cheque for a sum of 700*l.* in *July* last, and they paid it over to their solicitor, as they swear positively, with directions to apply it to a specific purpose. He receives it as such, but does not apply it to that purpose; and now contends, that he is entitled to retain it to pay what is due to himself. If these facts appear on the affidavits, I shall order payment in ten days.

The

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I have read these affidavits, and I am confirmed in the opinion I entertained. I am quite clear that the Plaintiff is entitled to the order for payment.

Mr. *Kay* asked for interest.

The MASTER *of the* ROLLS. No, I cannot order that.

BRADBURY *v.* DICKENS.

March 26.
April 28.

BY articles of agreement made the 28th day of *March*, 1850, between *Charles Dickens* of the first part, Messrs. *Bradbury* and *Evans*, printers, of the second part, *John Forster*, of the third part, and *William Henry Wills*, of the fourth part, after reciting that the several parties thereto had projected and were about to establish a new weekly periodical, under the name or title of *Household Words*, and that it had been agreed that they should be interested therein in the proportions and subject to the stipulations and agreements thereinafter mentioned, the several parties covenanted with each other, that they would be, and continue joint proprietors of the periodical called *Household Words*, and that *Charles Dickens* should have half the profits, Messrs. *Bradbury* and *Evans* one-fourth, and *Forster* and *Wills* the remaining fourth. And it was agreed, that they should be proprietors of the weekly periodical so to be established, called *Household Words*, subject to the stipulations thereinafter contained, and should be interested therein

The Defendant was one of the proprietors and the editor of a weekly periodical, called *Household Words*. *Held*, on a dissolution of the partnership, that he was not justified in advertising that the publication would be discontinued; for that the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets. But *held*, that he might advertise the discontinuance of the publication as regarded himself.

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therein and in the gains and profits thereof, and should bear and pay all losses and expenses in relation thereto in the proportions following, namely, the said *Charles Dickens* one half part or share thereof, the said *William Bradbury* and *Frederick Mullett Evans* one-fourth part or share thereof, and that *Charles Dickens* should be and was thereby appointed editor of the said periodical, and as such should exercise absolute control over the literary department thereof, and over all the agreements, rates of payment and orders for payment, made on account of the said partners in respect of the said literary department, and should be entitled, so long as he should continue such editor, to receive the sum of 500*l.* per annum as a remuneration for his services as such editor, and for any literary articles he might contribute. Messrs. *Bradbury* and *Evans* were to be the printers and publishers, and also the general managers and manager of the publication, so long as they respectively should remain personally interested therein; *Forster* was to contribute literary articles and *Mills* to act as sub-editor, and neither of the parties was to sell, assign, or transfer his share or interest in the said publication, or any part thereof, without first tendering or offering the same to his co-proprietors. In case of the decease of either of the parties, or of any other proprietor of shares in the publication, during the continuance thereof, his executors or administrators were to receive the same proportion of profits as the deceased, but should not interfere in the management or direction of the publication. And that on the expiration of the said publication, either by agreement or otherwise, all the stock, chattels and property of the said joint undertaking, except debts owing to the same, should (unless the parties should agree as to the value thereof or as to some other appropriation of the same) be sold by

by public auction to the highest bidder or bidders, with liberty for any or either of the parties thereto to bid for the same, and the produce be divided amongst the proprietors.

This weekly periodical had accordingly been established, and had ever since been carried on and published under the title of "*Household Words*, a Weekly Journal, conducted by Mr. *Charles Dickens*."

In consequence of misunderstandings, *Charles Dickens*, on the 22nd day of *December*, 1858, sent a written notice to the Plaintiffs and *Wills*, that upon the completion of the nineteenth volume of *Household Words*, which would take place in the month of *May*, 1859, the partnership should be dissolved, and that he should immediately afterwards take such steps as he might be advised for the winding up of the affairs of the said partnership.

The Defendant, *Charles Dickens*, also prepared and caused to be printed, published and circulated amongst the trade, the following notice or advertisement:—

"'The story of our lives from year to year.'—*Shakspeare.*

"On *Saturday*, the 30th *April*, 1859, will be published, price Twopence, the first number of *All the Year Round*, a weekly journal designed for the instruction and entertainment of all classes of readers, and to assist in the discussion of the social questions of the day. Conducted by *Charles Dickens*.

"Address—

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"ADDRESS.—Nine years of *Household Words* are the best practical assurance that can be offered to the public of the spirit and object of *All the Year Round*. In transferring myself and my strongest energies from the publication *that is about to be discontinued* to the publication that is about to be begun, I have the happiness of taking with me the staff of writers with whom I have laboured, and all the literary business and co-operation that can make my work a pleasure," &c. &c. It concluded thus:—"The task of my new journal is set, and I will steadily try to work the task out. Its pages shall shew to what good purpose their motto is remembered in them, and with how much of fidelity and earnestness they tell—'The story of our lives from year to year.' *Charles Dickens.*"

"On *Saturday*, 28th *May*, 1859, Mr. *Charles Dickens* will cease to conduct *Household Words*, *that periodical will be discontinued*, and its partnership of proprietors dissolved."

Messrs. *Bradbury* and *Evans* instituted this suit against Mr. *Charles Dickens* and Mr. *Wills*, praying:—(1) That the partnership might be dissolved and wound up; (2) that *Charles Dickens* might be restrained, by injunction, from advertising or publishing the above notice or advertisement, or any other notice or advertisement, announcing the discontinuing the periodical called *Household Words*, or the substitution of any periodical in the place thereof or in succession thereto, or continuing any announcement to the same or a similar effect; (3) That the copyright of the *Household Words* might be forthwith sold as a going concern.

A motion was now made for an injunction.

Mr.

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Mr. *R. Palmer* and Mr. *Jessel* for the Plaintiffs. The Defendant ought to be restrained from these acts, which are damaging and destroying the value of the partnership property for his own sole benefit. The agreement does not stipulate for the continuance of the partnership for any fixed period; but it contemplates its continuing so long as the partners should continue to carry on the publication, and it provides also, that the interest of a proprietor should not cease upon his death, but should pass to his executors or administrators; it has, in all respects, the appearance of a permanent scheme, liable only to be determined by mutual agreement, or by the event of what the agreement calls "the expiration of the said publication," which means its coming to a natural end, in the absence of agreement, and by failure of future public support.

But as there is no limit fixed for the duration of the partnership, it cannot be disputed that any partner in it has a right, at any time, to put an end to the partnership. The effect of this would be, that the partnership must be wound up, and all the assets sold, including the copyright and the right to continue the work and to use the title of "*Household Words*," which is of itself of considerable value. This right is part of the partnership assets, and the Defendant has no right to appropriate it to himself, or to damage the continuity, good-will or succession of the publication. If the proprietors of the *Times* newspaper were to disagree, it would be sold, together with the right to use the name, for the benefit of all the proprietors, and none of them would be allowed to announce its total discontinuance. Such a sale of newspaper property has taken place within a few years, in the case of the *Morning Herald* and *Morning Chronicle*.

On

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On the dissolution of the partnership, it became the duty of the Defendant to make the most of the partnership property and rights. He is not justified before the sale to slander and calumniate the rights of his co-partners, or to say that the publication is to be discontinued. The effect will be most prejudicial, the regular subscribers to the *Household Words* will most probably make new arrangements for taking in some other publication, if they believe that the old one is wholly to cease, and that Mr. *Charles Dickens* will commence a new periodical with the old "staff of writers."

The Defendant has been guilty of a plain breach of duty prejudicing his co-partners, and he ought to be restrained, by injunction, from damaging the publication and destroying the connexion.

They referred to *Marshall* v. *Watson*(*a*).

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I do not think that any case is made to restrain the Defendant from saying that he is about to publish another work in continuation of *Household Words*. The only question is, whether he is entitled to say simply, "that the periodical will be discontinued," or whether he must not add some qualified words after the word "discontinued." My present impression is, that the partners have a right to have the name sold. I express no opinion whether it will be worth anything, when it is known that the former editor and contributors have left it and intend to set up a similar publication. But that this must seriously injure its value, everybody can plainly see.

Mr.

(*a*) 25 *Beav.* 501.

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Mr. *Selwyn* and Mr. *Hobhouse* for Mr. *Dickens*. The title of the publication in question is not "*Household Words*," but "*Household Words*, a Weekly Journal, conducted by Mr. *Charles Dickens*," and the Defendant stipulates, in express terms, that "he is to be the editor, and in that capacity exercise absolute control over the literary department," &c., &c. There is nothing stated in the advertisement which is not strictly true; it states that "on *Saturday*, the 28th of *May*, 1859, Mr. *Charles Dickens* will cease to conduct *Household Words*, that periodical will be discontinued, and its partnership of proprietors dissolved." The essence of the work is the editorship of it by Mr. *Dickens*, and when he retires it will and must cease. If it be attempted to continue it without the mental machinery which alone gives it value, it will be a fraud on the public; and as Mr. *Dickens*, in his affidavit, states, that "it concerns not only his pecuniary interests, but his honor and reputation, that his name should not be erroneously associated with any publication which he has ceased to conduct; and that the public should know (as they have a right to know) that if any periodical is published subsequently to *May*, 1859, under the name of '*Household Words*,' it is not the same publication which has hitherto borne that name."

It is impossible that the work can be continued in the absence of Mr. *Dickens*. If it were attempted to be continued by others, it might do a serious injury to his literary reputation. The public, who purchase on the faith of Mr. *Dickens*' connection with it, have a right to be informed that he has ceased to be concerned in and to conduct it. The good-will, if sold, must be of "*Household Words*, conducted by the Defendant," and if a work under the title of "*Household Words*" alone be published

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lished after the 29th of *May*, it will be a totally different work.

The advertisement is strictly true, and the Defendant has a right to publish it.

Mr. *R. Palmer*, in reply, argued that the introduction of the words "discontinued by him" (which had been suggested by the Court) would not be a sufficient protection to the Plaintiffs. He pointed out that the words "conducted by Mr. *Charles Dickens*," formed no part of the title in the agreement, and was no more essential than the stipulation that the printing was to be conducted by the Plaintiffs. That the agreement contemplated a continuance of the work on the death of Mr. *Dickens*, which shewed that it was a serial publication, not necessarily dependent on his conducting it. That Mr. *Dickens* had a right to say, that from a certain day he would cease to be connected with it, or that his supervision and literary management would then terminate; but that he had no right, against the will of his partners, to advertise that the periodical would be discontinued.

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The property in a literary periodical like this is confined purely to the mere title, and the title of this work is "*Household Words*," and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value. I think that the insertion of the words "by me," or "by the editor," after the word "discontinued," in the address to the public, would make it free from all cavil. Mr. *Palmer* presses upon me very strongly, that Mr. *Dickens* has no power to put an end to the work, but I am not clear that he has not. His mere retirement may *de facto* annihilate it

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it, for its existence and value may entirely and solely depend on his name being associated with it; so that the name of "*Household Words*" may be utterly worthless, as soon as it becomes generally known that he has nothing more to do with it. That, however, is a matter which can only be determined by the result.

I am, however, satisfied, that the statement that he has nothing more to do with it, is properly represented by his saying that "it will be discontinued by me," which does not import that it is to be discontinued absolutely and positively; it merely asserts that, as far as he has anything to do with it, it is to be discontinued, and I think that this is all the Plaintiffs are entitled to require. Accordingly, upon Mr. *Dickens* undertaking, in the future advertisements he publishes, to insert the words "by him," or equivalent words, after the word "discontinue," I will make no order at all upon this motion, but reserve the costs of it, until I see what the result is, when the partnership property comes to be disposed of.

On the 28th of *April*, 1859, a decree was made, whereby it was ordered, that the right to use, from and after the 28th of *May* next, the name of the periodical called "*Household Words*," and the right, from and after the said 28th *May*, to publish, under the said name or title, any periodical or other work, whether in continuance of the said periodical called "*Household Words*," or otherwise, as the purchaser should think fit, be sold, subject to such conditions as the Judge should direct.

NOTE.—The right was accordingly sold by auction on the 16th *May*, 1859, and produced 3,550*l*. The publication of "*Household Words*" thereupon ceased.

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HUNT *v.* ELMES.

May 7, 11.

A., the owner of an estate, first mortgaged it to *B.*, and afterwards sold and conveyed it to *C.*, to whom he delivered the title deeds. In a suit by *B.* against *C.*, insisting on his priority, *C.*, by his answer, professed to state the contents of the deed of conveyance to *A.* He admitted the possession of this and the other title deeds, but insisted that he was a purchaser for valuable consideration without notice; and he said, that *B.* had no right or title to the production of the deeds, or any interest therein. *Held*, that *B.* was entitled to the production of the conveyance to *A.*, but that the other title deeds were privileged.

ACCORDING to the allegations of the bill and the statements in the answer, it appeared that *David Hughes*, a solicitor, purchased a piece of land at *Maryland Point* in *Essex*, with five unfinished houses thereon, which were conveyed to him by an indenture of the 30th of *May*, 1854. On the 30th of *April*, 1855, *David Hughes* mortgaged this with other property, for a term, to the Plaintiff, his client, for 1,000*l.* About the same time *Hughes* delivered to the Plaintiff a bundle of fourteen deeds in an envelope indorsed as the title deeds of this and the other mortgaged property.

In *July*, 1858, *David Hughes* absconded and went to *Australia*. The Plaintiff afterwards discovered, that in *September*, 1855, *Hughes* had sold the property in question to the Defendant for 675*l.*, and that he had conveyed it to him on the 18th of *October*, 1855. *Hughes*, at the same time, handed over to the Defendant the title deeds relating to the property, which he had fraudulently retained, instead of including them in the bundle of deeds delivered over to the Plaintiff in *April*, 1855. The Defendant, who had no notice of the Plaintiff's mortgage at the time he purchased, had since taken possession, and had laid out 1,300*l.* in finishing the five houses.

The Plaintiff by his bill insisted, that his mortgage had

had priority over the Defendant's purchase, and the bill prayed, that the Defendant might either pay the amount due on the mortgage or stand foreclosed. The Defendant by his answer stated, that by an indenture, dated the 30th of *May*, 1854, a piece of freehold land at *Maryland Point*, &c. " with five unfinished houses then in course of erection thereon, were, in consideration of £700 therein expressed to be paid by *David Hughes*, conveyed to *David Hughes* for an estate in fee simple, and that the said land and houses were more particularly described in the last-mentioned indenture."

The Defendant admitted that he had in his possession the title deeds of the property, and the abstract of title, &c., but he said, " they are the title deeds and muniments of title relating to the fee simple and inheritance of the said land and houses at *Maryland Point*." He said, " I am advised and verily believe *that the Plaintiff has not any right or title to the production of or any interest in the documents*," and he objected to produce them. The Defendant insisted that he was a purchaser for valuable consideration without notice of the Plaintiff's alleged mortgage security.

The Plaintiff applied by summons for the production of all the documents admitted by the Defendant to be in his possession, and the matter was adjourned into Court.

Mr. *Swanston*, jun., for the Plaintiff, argued, that the Defendant was bound to produce all the documents. He cited and commented on *Combe* v. *The Corporation of London* (*a*); *Smith* v. *The Duke of Beaufort* (*b*); *Swinborne*

(*a*) 1 *Y. & Coll.* (*C.C.*) 631. (*b*) 1 *Phillips*, 209; 1 *Hare*, 507.

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Swinborne v. *Nelson* (*a*); *Clegg* v. *Edmonson* (*b*); *M'Intosh* v. *The Great Western Railway Company* (*c*).

Mr. *Godfrey*, for the Defendant, argued, that the Defendant was not bound to produce the title deeds, and that they did not relate to, or tend to prove the issue tendered by the Plaintiff. He cited *Bolton* v. *Corporation of Liverpool* (*d*); *Wigram on Discovery* (*e*); *Wiseman* v. *Westland* (*f*); *Head* v. *Egerton* (*g*).

Mr. *Swanston*, jun., in reply.

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May 11. In this case I have read the answer, and I think the Defendant has sufficiently protected himself from the production of these documents, with the exception of one. In fact, the way in which the defence is pleaded is, that he is a purchaser for valuable consideration without notice, and he says they are his title deeds, and he believes the Plaintiff has no interest in them. Certainly it is not very strictly pleaded, and this is to be taken most strongly against the pleader, but having regard to the statement that he is a purchaser for valuable consideration, that they are his muniments of title, and that the Plaintiff has no interest in them, I think that there is a sufficient averment to protect them from production.

With respect to the other document, namely, the conveyance to *David Hughes*, the answer professes to set out the contents; and in *Latimer* v. *Neate* (*h*), which binds me, though its authority has been questioned (*i*), it

(*a*) 16 *Beav.* 416.
(*b*) 22 *Beav.* 125.
(*c*) 1 *M. & G.* 73; 1 *Hall & Twells*, 41.
(*d*) 1 *Myl & K.* 88.
(*e*) *Page* 275 (*2nd ed.*)
(*f*) 1 *Younge & Jervis*, 117.
(*g*) 3 *Peere Williams*, 280.
(*h*) 11 *Bligh*, 154; 4 *Cl. & Fin.* 570.
(*i*) *Wigram on Discovery*, 352 (*2nd ed.*)

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it was held that when a Defendant professes to set out a deed, the Plaintiff has a right to see whether it is stated correctly or not, and that the Defendant is bound to produce it.

I think that the conveyance to *Hughes* of the 30th of *May*, 1854, must be produced, but that the other deeds are privileged (*a*).

(*a*) *Bennett* v. *Glossop*, 3 *Hare*, 578; *Rumbold* v. *Forteath* (*No.* 2), 3 *Kay & J.* 748.

LANCE *v.* AGLIONBY.

June 3.

A testator bequeathed certain personal property to his wife specifically, and he devised his real and personal property to trustees for sale, and out of the produce, in the first place, to pay his debts, funeral expenses and legacies; and, in the next place, to invest the surplus; and, subject to the trusts aforesaid, to pay the income to his wife for life, with remainder over. By a codicil, he gave all his personal estate to his wife. *Held*, that the widow was entitled to the personal estate exonerated from the debts and legacies, and that they were primarily charged on the real estate.

THE testator *Henry Aglionby Aglionby*, by his will dated in 1852, after giving some small pecuniary legacies, proceeded as follows:—

"I give and bequeath to my said wife all my household furniture and personal property, of every description, which may, at the time of my decease, be in the house at *Nunnery*, in the county of *Cumberland*, and in the house at *Newbiggen Hall*, in the same county, and in or upon my farm at *Crossfield* now occupied by me, in the same county, and in or upon any house, farm or lands now occupied by me in the parish of *Caterham*, in the county of *Surrey*, under any lease, agreement or otherwise. I give, devise and bequeath all my manors, lordships and seigniories, with the fines to become payable upon my decease, to *John Henry Lance*, his heirs and

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and assigns, upon the same trusts as are hereinafter declared concerning my real estate hereinafter devised to *John Henry Lance* and *Richard Baynes Armstrong*. I give, devise and bequeath unto and to the use of *John Henry Lance* and *Richard Baynes Armstrong*, their heirs, executors, administrators and assigns, all the rest of my messuages, lands and tenements in the counties of *Cumberland*, *Westmoreland*, *Middlesex* and *Kirkcudbright*, or elsewhere, whether freehold, leasehold, copyhold or of whatever tenure the same may be, and all other my real estate, and the residue of all my personal estate, whatsoever or wheresoever the same may be, upon the several trusts hereinafter declared of and concerning the same (that is to say), upon trust to sell and convert into money or mortgage my said trust estates, or any such part or parts thereof as they my said trustees may in their sole discretion think necessary," with full power to suspend the sale, mortgage, conversion or getting in of the said trust estate, and in the meanwhile to manage it.

He then proceeded as follows:—"And as to the moneys to arise from the sale, mortgage, conversion and getting in of my said trust estates, upon trust thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, also my debts and my funeral and testamentary expenses, and in the next place, to pay the pecuniary legacies hereinbefore bequeathed; and upon further trust to invest the surplus, if any, of the said trust moneys in the names of my trustees in or upon permanent public stocks, &c." or on mortgage. "And subject to the trusts aforesaid, I order and direct that my trustees shall pay the rents, issues and profits of my real estate, and the interest, dividends and proceeds of the residue of

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of my personal estate (the fines payable upon my decease and afterwards in respect of my manors to be deemed and taken as part of the said personal estate), to my wife for life, and after her decease upon trust to pay the same" to Mrs. *Mary Aglionby* for life, subject to an annuity of 30*l.* to Miss *Lance*; "and subject to the said annuity and the trusts for sale, mortgage and conversion as aforesaid, and the life interests as aforesaid, I give, devise, order and appoint and bequeath all my said real and personal estate in my trustees as aforesaid to my three cousins, *Elizabeth Aglionby*, *Mary*, the wife of the Reverend *Beilby Porteus*, and *Jane*, the wife of *Charles Featherstonhaugh*, esquire, her and their heirs, executors, administrators and assigns absolutely for ever as tenants in common."

The testator afterwards made a codicil to his will, dated the 14th of *April*, 1854, which was as follows:—

"This is a codicil to the last will and testament of me *Henry Aglionby Aglionby*, of *Nunnery*, in the county of *Cumberland*, esquire. I hereby give and bequeath *all my personal estate*, whatsoever and wheresoever, unto my dear wife *Mary Ann Aglionby*; and I hereby confirm my said will in every particular, except as altered by this my codicil."

The testator died on the 31st of *July*, 1854, and the Plaintiffs, *Lance* and *Armstrong* (his executors) proved his will and codicil.

Mr. *Lloyd* and Mr. *Pole* for the Plaintiffs, the trustees and executors, stated the case.

Mr. *R. Palmer* and Mr. *Bagshawe*, jun., for the representative

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sentative of the widow, argued that the widow was entitled to the personal estate exonerated from the debts, funeral and testamentary expenses and legacies, and that this construction was warranted by all the authorities; *Buckeridge* v. *Ingram* (*a*); *Greene* v. *Greene* (*b*); *Michell* v. *Michell* (*c*); *Driver* v. *Ferrand* (*d*); *Blount* v. *Hipkins* (*e*); *Jarman on Wills* (*f*).

Mr. *Selwyn* and Mr. *J. Pearson*, for the three residuary devisees, argued that the produce of the real and personal estate had been blended into one fund; *Roberts* v. *Walker* (*g*); *Boughton* v. *James* (*h*); out of which the debts and legacies were payable *pari passu*; and that the effect of the codicil was, to give to the widow an absolute, instead of a life interest in the personal estate after bearing its due portion of the burthen.

June 3. *The* MASTER *of the* ROLLS (without hearing a reply) said:—

I think the whole personal estate belongs to the wife, exonerated from the payment of the debts and legacies. I observe that the testator begins his will by giving to his wife all his household furniture and personal property of every description which may, at the time of his decease, be in certain houses and upon certain farms. When he has done that, he gives all his real and "the residue of all his personal estate" to trustees to be converted and to form a mixed fund, out of which the debts and legacies given by his will are to be paid, and then the rents of the real estate and the interest of the residue of his personal estate (that is, the second residue) are to be paid to the wife for life, and then to a lady

(*a*) 2 *Ves. Jun.* 652.
(*b*) 4 *Madd.* 148.
(*c*) 5 *Madd.* 69.
(*d*) 1 *Russ. & M.* 681.
(*e*) 7 *Sim.* 43.
(*f*) *Vol.* 2, *pp.* 546, 559 (2*nd ed.*)
(*g*) 1 *Russ. & Myl.* 752.
(*h*) 1 *Colly.* 26.

lady who is since dead, and afterwards, subject to certain annuities, to three cousins.

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Then comes the codicil, by which he gives all his personal estate whatsoever and wheresoever unto his wife, and confirms his will. He substitutes that gift of personal estate to his wife for that already given to her. He had given her "all his household furniture and personal property of every description" at certain places. It is quite clear that he did not intend that specific legacy to be applied in payment of his debts and legacies, for he expressly gives the residue of his personal property, together with his real estate, as a mixed fund for that purpose. Suppose that instead of that limited gift to his wife, he had given her, by his will, all his personal estate whatsoever and wheresoever, and then he had gone on exactly as he has done in this will to give his real estate and the residue of his personal estate to form a mixed fund for the payment of debts and legacies; the word "residue" would not, in that case, have been unmeaning, because the widow might have died before him, and he might have intended to provide for that event, and that his debts and legacies should then be paid out of both his real and personal estate. It is quite clear that the first gift to the widow does not contribute to the payments of debts and legacies in any way whatever; and, in fact, this is a stronger case than those referred to, where the testator has provided two funds for the payment of his debts and legacies, and has afterwards withdrawn one of them. He has here exonerated a part of his personal estate in the first instance from the payment of his debts and legacies, and (by the codicil) given it specifically to his wife; he has merely enlarged that gift, and has specifically given to her every particle of personal estate which he had. It is suggested that

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that the codicil gives the whole personal estate to her, subject to the ordinary liability that the law attaches to it, which is to the payment of debts. But I think she takes it beneficially, just in the same manner as she took the limited bequest by the will, and for which this is really substituted. It is impossible to say that she can take it exactly in the same way as she took what I may call the second residue under the will, because there is nothing here that imports a residue, but it really necessarily includes everything he had.

I am, therefore, of opinion that the widow took the personal estate exonerated from the payment of the debts and legacies, and I make a declaration to that effect.

DECREE.

Declare, that, according to the true construction of the will and codicil, the expenses incident to the execution of the trusts and powers declared and contained in the will of the testator, and his debts and funeral and testamentary expenses, and the pecuniary legacies bequeathed by his will, are charged on, and payable out of, his real estates devised by his will, and the rents, profits and proceeds thereof, primarily and in exoneration of his personal estate.

1859.

MEDWORTH *v.* POPE.

June 11.

Bequests to illegitimate children, *in esse*, will take effect when they are appropriately described; but a prospective gift to future illegitimate children of a woman is wholly void.

THE testator, at the date of his will, had six illegitimate children by his housekeeper, *Sarah Gibson*. By his will, dated in 1825, he gave a house to each of these six children, who were all described in his will as his natural sons or daughters, and by their names.

He then gave, devised and bequeathed *to such other child, if any, that might be born of his housekeeper Sarah Gibson in his lifetime, or in due time after his death*, for such child's own use and benefit, and to the child's heirs and assigns for ever, two houses in *Wisbeach*. But his mind and will was, that if one or more of *his said natural children, videlicet* [naming the six], "or the child that might be born of his the said testator's housekeeper *Sarah Gibson*, in way and manner as aforesaid, should depart this life before they should respectively have attained the age of twenty-one years, and leave lawful issue, such issue should take equally the estates and premises thereinbefore given to their parents."

After the date of the will, and in *September*, 1827, another child, viz., the Defendant *Edward Medworth Gibson*, was born of the testator's housekeeper *Sarah Gibson*, and he was the reputed son of the testator by his housekeeper.

The testator died in *November*, 1827.

Edward Medworth Gibson claimed to be entitled, as a natural

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a natural child of the testator designated by the will, to the hereditaments and benefits devised and bequeathed to or in trust for "such other child, if any, that might be born of the said testator's housekeeper *Sarah Gibson* in his lifetime, or in due time after his death."

In support of the devise, it was argued, that the person to take being sufficiently defined, there was nothing to prevent an illegitimate child from receiving the benefit of the devise to him. That it was the uncertainty introduced by the reference to the father of an illegitimate child, which alone rendered such a bequest incapable of taking effect, for the paternity could not be determined; but that where (as in the present case) such a child was described with reference to his mother, no doubt could exist as to the identity of the person thus designated as the object of the gift, and if so, that there could not be any reason why an illegitimate child should be deprived of his rights, or held incapable of taking the benefit of a devise clearly intended for him.

On the other hand, it was argued, first, that the devise was ineffectual, because this being a gift to the child of *Sarah Gibson*, the law assumed that a legitimate and not an illegitimate child was intended, and that it was clear that if she had had another illegitimate child, and had afterwards married, and had a legitimate one, the latter alone could take under this devise. Secondly, that the law did not sanction a gift to illegitimate children not *in esse*, on the ground that to permit such gifts would be to encourage immorality.

Mr. *Follett* and Mr. *Welford* for the Plaintiffs.

Mr. *Shebbeare* and Mr. *E. Lloyd*, jun., in the same interest.

Mr.

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Mr. *R. Palmer* for *Edward Medworth Gibson.*

Mr. *C. Hall* for the trustees.

The following cases were cited:— *Pratt* v. *Mathew* (*a*); *Bentley* v. *Blizard* (*b*); *Jarman on Wills* (*c*); *Re Connor* (*d*); *Mortimer* v. *West* (*e*); *Wilkinson* v. *Adam* (*f*); *Metham* v. *The Duke of Devon* (*g*); *Gordon* v. *Gordon* (*h*); *Earle* v. *Wilson* (*i*).

The MASTER *of the* ROLLS.

An illegitimate child *in esse* or *en ventre sa mère* may, if properly described, take the benefit of a devise or bequest, and the Court will not inquire as to his parentage or origin; but in respect of future illegitimate children, the law will not allow them to take under any description whatever.

I had occasion to consider the point in *Pratt* v. *Mathew* (*k*), but I did not think it proper to express my opinion, because the question was not then before me.

The reason why the English law so holds is, that it considers such a provision for future illegitimate children as *contrà bonos mores.*

I am of opinion that this child takes nothing.

(*a*) 22 *Beav.* 328.
(*b*) 4 *Jurist, N. S.* 652.
(*c*) *Vol.* 2, *p.* 202.
(*d*) 2 *Jones & Lat.* 456.
(*e*) 3 *Russ.* 370.
(*f*) 1 *Ves. & B.* 422.
(*g*) 1 *Peere W.* 529.
(*h*) 1 *Mer.* 141.
(*i*) 17 *Ves.* 528.
(*k*) 22 *Beav.* 328.

1859.

REMNANT *v.* HOOD.

June 2, 28.

A testator directed his trustees to make a settlement of his real estate, containing a power to the tenant for life to charge the estate with a sum for portions for his younger children. *Held*, that in determining the rights of the younger children, the portions could not be treated as legacies under the will, but that such rights must depend on the terms of the instrument executing the power.

An estate was charged with portions for younger children, "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable." *Held*, that a younger child who attained twenty-one, but died in the life of the tenant for life, took a vested interest.

THE testator, Sir *Nathaniel Thorold*, died in 1764, having by his will directed his trustees to convey his real estates to *Samuel Thorold* for life, with remainder to his first and other sons successively in tail male, with remainder to his first and other daughters in tail male. And he directed that in the settlement should be inserted a power to *Samuel Thorold* to jointure, and likewise a power enabling him to charge the estates with any sum not exceeding 2,000*l.*, for the portion of his younger children.

No settlement was ever made; but on the marriage of *Samuel Thorold* with Miss *Anderson*, in 1772, *Samuel Thorold* exercised his power of jointuring, and he charged the estates "with the sum of 2,000*l.*, for the portion or portions of the daughter or daughters, younger child or younger children of *Samuel Thorold* on the body of the said *Ann Anderson* lawfully to be begotten, to be *raised and levied within three calendar months after the decease of Samuel Thorold*, by such ways and means as shall be expedient in that behalf, *and to be forthwith paid and payable* in manner following (that is to say), if there shall be an eldest or only son, and one such daughter or younger child, the same to be raised and paid for the portion of such only daughter or younger child; and if there shall be two or more such daughters

A Defendant having, *pendente lite*, offered to pay all that was ultimately found due from him, the Plaintiff was ordered to pay all the subsequent costs of suit.

daughters or younger children, then the said sum of 2,000*l.* to be equally divided between them, share and share alike, for the portion and portions of all and every such daughters or younger children."

There were seven children of the marriage, consisting of a son and six daughters. The son attained twenty-one, and died in 1777, unmarried. Two of the daughters died infants in the life of their father; a third, *Theodicia*, attained twenty-one, and in 1800 she married Mr. *Gibbons*, and died in the same year, in the lifetime of her father. The remaining three daughters survived their father; *Ann*, as eldest, became entitled to the estates, and the other two were *Louisa Margaret Moye* and *Sophia Katherine Whitehouse*.

Samuel Thorold died in 1820. After his decease, one-half of the 2,000*l.* was paid to *Whitehouse* and wife, and 50*l.*, on account, to Mrs. *Moye*; 950*l.* remained unpaid, which Mrs. *Moye* had assigned to the Plaintiff. Interest on the 950*l.* had been paid by the owners of the estate to Mrs. *Moye* and afterwards to the Plaintiff down to 1848.

This suit was instituted by Mr. *Remnant*, to have the remainder of the 2,000*l.* now raised, by a sale or mortgage of the estates on which it was charged.

The question argued was, whether *Theodicia*, who had attained twenty-one, but had died in her father's life, was entitled to participate in the portion. Pending the suit, an offer was made to pay the Plaintiff one-third of the portion.

Mr. *F. T. White* for the Plaintiff. The 2,000*l.* vested in such younger children of *Samuel Thorold* as were living at his decease, viz., Mrs. *Moye* and Mrs. *Whitehouse*. Mrs. *Gibbons*, who died in the lifetime of her father, took no share; *Duke of Chandos* v. *Talbot* (*a*). "Where

(*a*) 2 *Peere Wms.* 600, *and the note, p.* 612.

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"Where a portion is provided for a son on attaining twenty-one, or for a daughter on attaining that age or being married, and those events happen in the lifetime of the parent, the child, though it died in the lifetime of the parent, has acquired an absolute vested interest in the portion;" *Fry* v. *Lord Sherbourne* (*a*). This is the rule, but to which there are exceptions, viz., cases in which the fund is not raiseable except in the event of the children surviving, and cases where the trust is for a contingent class; *Whatford* v. *Moore* (*b*), *Skipper* v. *King* (*c*). To bring a case within the rule, it is necessary to find a period of vesting prior to the decease of the parent. Here no express period of vesting is mentioned, but one is specified for raising the portion, namely, "within three calendar months after the decease of *Samuel Thorold*," when it is "to be forthwith paid and payable," and that must be the period of vesting. The time of vesting cannot be inferred from any trust for maintenance, or by means of a gift over, for here there are no such clauses. In order to hold that Mrs. *Gibbons* became entitled to participate in the 2,000*l.* at twenty-one or marriage, it will be necessary to introduce words which are neither to be found in the will nor settlement.

Again, for the purpose of the exclusion of the eldest daughter, the period to be referred to is the death of *Samuel Thorold* (*d*); and this must be the time for ascertaining the class of younger children, and the period of vesting also; no other time is, expressly or by implication, mentioned; *Matthews* v. *Paul* (*e*).

In all cases like the present, the object is to postpone the vesting, in order to prevent a younger child, who in

(*a*) 3 *Sim.* 243, 259.
(*b*) 3 *Myl. & Cr.* 270.
(*c*) 12 *Beav.* 29.
(*d*) *See Adams* v. *Beck*, 25 *Beav.* 648, *since reported.*
(*e*) 3 *Swan.* 328.

in the interval becomes an eldest, and takes the estate itself, from participating in a portion charged upon it for younger children only, and in order that the inheritance may not be unnecessarily burdened; *Jarman on Wills* (*a*). The remarks of Sir *Wm. Grant*, in *Howgrave* v. *Cartier* (*b*), are qualified by Sir *George Turner*, in *Farrer* v. *Barker* (*c*).

The construction contended for by the Plaintiff is that, which, down to the time when the offer was made on behalf of the infant Defendant to pay one-third of the portion, was always put upon the settlement. A moiety of the 2,000*l.* was long since paid to Mrs. *Whitehouse*, and interest on the other moiety, after deducting 50*l.* paid on account, has been paid to Mrs. *Moye* and the Plaintiff down to a recent period; although the Plaintiff's right was subsequently disputed altogether by the principal Defendant, *Hood*, and by the infant.

Mr. *Lloyd*, Mr. *Martineau*, Mr. *Follett*, Mr. *Wickens*, Mr. *Faber*, Mr. *Shapter*, Mr. *Griffiths*, Mr. *Turner*, Mr. *Bagshawe*, Mr. *Bedwell* and Mr. *Nalder*, for different parties, argued that the reason for postponing the raising the charge was for the benefit of the tenant for life, and to prevent its affecting the estate in his lifetime; that the younger children required portions on attaining their majority or marriage, and at that time their interests vested. That, consequently, Mrs. *Gibbons* became, in her life, entitled to one-third of the 2,000*l.*, which passed to her representatives, and that, therefore, the Plaintiff was entitled to one-third and not one-half of the fund.

They also insisted, that as an offer had been made to pay to the Plaintiff all to which he was entitled, the subsequent

(*a*) *Vol.* 2, *p.* 119 (1*st ed.*)
(*b*) 3 *Ves. & B.* 83.
(*c*) 9 *Hare*, 737.

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sequent costs of the suit, which had been caused by his unfounded demands, ought to be paid by him.

Mostyn v. *Mostyn* (*a*); *Evans* v. *Scott* (*b*); *Lord Teynham* v. *Webb* (*c*); *Woodcock* v. *Duke of Dorset* (*d*); *Hubert* v. *Parsons* (*e*); *Lord Rivers* v. *Derby* (*f*); *Rooke* v. *Rooke* (*g*), were cited.

Mr. *White* in reply.

The MASTER *of the* ROLLS.

June 28. The question is, whether the sum of 2,000*l.*, provided for the portions of younger children, was divisible in thirds or in moieties; in other words, whether, under the terms of the power contained in the will, and of the clause contained in the deed executing the power, the interests of the three younger daughters in this charge vested in them upon their attaining twenty-one and marrying in the lifetime of their father, or whether the vesting was postponed until the death of their father.

The Plaintiff, who is the assignee of Mrs. *Moyes'* share, contends that the fund is divisible into moieties, and upon his behalf it is urged, that under the words of this settlement, there is no gift except in the direction to levy and to pay, which is upon the death of the father; that even if this were not so, yet, as the gift is derived from the will of Sir *Nathaniel Thorold*, it is in the nature of a legacy charged upon real estate: that, consequently, a different rule applies to such a case from that which is applicable to mere pecuniary legacies payable out of personal estate; and that the time of payment is annexed to the substance of the gift. For this,

Lady

(*a*) 1 *Colly.* 161.
(*b*) 1 *H. Lds. Ca.* 43.
(*c*) 2 *Ves. Sen.* 198.
(*d*) 3 *Bro. C. C.* 568.
(*e*) 2 *Ves. Sen.* 261.
(*f*) 2 *Vernon*, 72.
(*g*) 2 *Eden*, 8.

Lady Poulet v. *Lord Poulet* (*a*) is referred to, as establishing the distinction followed in many subsequent cases, which were also referred to, and most of which are cited and commented upon by Lord *Cottenham* in the case of *Whatford* v. *Moore* (*b*).

Upon the other side, it is said, that this case falls within an extensive exception to the rule above referred to, which is, that when an estate is devised to one for life, and after his decease is charged with legacies, the payment of the legacies is postponed until the decease of the tenant for life, only because it would derogate from his life estate if they were raised in his lifetime, and that consequently, as the payment is postponed for the convenience of the life estate, the Court infers, that it was the intention of the testator that the legatee should take the legacy at all events, and even although he should not live until the time when the legacy becomes payable. This constitutes the distinction between such cases and those where the legacy is postponed exclusively on account of circumstances applicable to the personal character of the legatee, such as his attaining twenty-one, or marrying, or the like. In the latter class of cases, if the legatee die before the appointed time, the legacy fails and falls into the estate; but in the former class, although the legatee may die before the legacy is payable, his legal personal representative will be entitled to receive it. If this were to be regarded as the case of a charge created by a will simply, a question of some difficulty, arising from the conflict of authorities, might have to be determined—namely, whether the portions would not vest during the life of the father, at the time when they were required for the settlement in life of the children, upon the principle

(*a*) 1 *Vernon*, 204. (*b*) 3 *Myl. & Cr.* 270.

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ciple pointed out by Mr. *Cox* in his note to the *Duke of Chandos* v. *Talbot* (*a*). But I think that this difficulty does not arise here, for I am of opinion that this case cannot properly be treated as the case of legacies given by a will and charged upon the real estate of the testator; and that although the principles derived from these cases are, in a great measure, applicable to the present case, still that it must not be forgotten, that the 2,000*l.* is not here given by a will, but by a settlement: it must, therefore, depend upon the terms of the settlement who are to take, and at what period their shares become vested. It is true, no doubt, that the will of Sir *Nathaniel Thorold* gives the father the power to raise this sum for portions for younger children, but the terms of the power are quite general, and the words of the settlement executed upon the marriage of the father, who exercised the power, must govern the rights of the persons taking under it. The way in which the Court considers the question, is, I think, well expressed by Sir *William Grant* in *Howgrave* v. *Cartier* (*b*). He says, "the sort of question that arises in this case has so frequently occurred of late, that there is no great difficulty in collecting the law upon it. If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave, in a degree, uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision; usually as to sons at the age

(*a*) 2 *Peere Wms.* 612. (*b*) 3 *Ves. & B.* 85.

age of twenty-one, and as to daughters at that age or marriage."

Now, regarding this settlement upon these principles, I think that it was not necessary that the children should survive the father, in order to enable them to become entitled to the fund. The words of the settlement, which I refer to again, are these: it charges the estate "with the sum of 2,000*l.* for the portion or portions of the daughter or daughters, younger child or children of *Samuel Thorold* on the body of *Ann Anderson*, to be raised and levied within three calendar months after the decease of *Samuel Thorold*, by such ways and means as should be expedient in that behalf, and to be forthwith paid and payable in manner following, that is to say."

The postponement here is for the convenience of the estate, in order not to derogate from the interest of the tenant for life. It is true that in *Whatford* v. *Moore* (*a*), Lord *Cottenham* affirmed the decision of the Vice-Chancellor *Shadwell*, where he came to a different conclusion; but upon examining that case, it appears that the Lord Chancellor did not, by any means, doubt the principle I have referred to, as stated by Sir *William Grant*; but that his Lordship relied upon the peculiar words of the instrument in that case, which expressed, in the opinion of the Lord Chancellor, a direction, that the money should be raised, after the death of the husband and wife, only for the benefit of the younger children then living, unless the husband should, by writing, direct it to be raised at an early period. *Howgrave* v. *Cartier* (*b*), to which I have already referred, was, I think, a stronger case for the construction which the

(*a*) 3 *Myl. & Craig*, 270. (*b*) 3 *Ves. & B.* 79.

1859.

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the Plaintiff insists upon, yet Sir *William Grant* held, that survivorship was not necessary to constitute a right to receive a share of the portion settled.

It is clear, that those cases, which determine that portions not raised are to fall into the estate for the benefit of the reversion, and to which some reference was made by Mr. *White* in his argument, would, if applicable, be injurious to the case of the Plaintiff, as it might raise the question, whether the other children who died in infancy might not take a share, which, not having become payable, must fall into the estate, but they could in no way give the Plaintiff above one-third. Nothing turns upon the fact, that half was paid to Mr. *Whitehouse;* no case of acquiescence is alleged; nor is there anything that concludes the Defendants from contesting the right of the Plaintiff, or which could give him more than the share to which Mrs. *Moye* is entitled, upon the mere words of the marriage settlement of her father and mother.

I am of opinion that the charge vested in the three younger children upon their attaining twenty-one, although it was not payable until within three months after the death of their father.

The Plaintiff must have costs down to the 11th of *March*, 1858, when the tender was made, but he must pay the costs of all parties from that time. There must not be two sets of costs in respect of one share. I cannot allow trustees to appear separately, and a mortgagor and his mortgagees can only have one set of costs.

NOTE.—*See Mathews on Portions, chap. iv.*

1859.

PAYNE *v.* LITTLE.

June 15.

An order to tax the costs of an executor in a suit, including any costs, charges and expenses properly incurred by him in the execution of the trusts of the will, does not include the costs of his defence to other suits instituted against him as executor.

THE Defendant *John Little* was the executor of the testator *William Preest*, who died in 1820, and this suit was instituted by the Plaintiff, a *cestui que trust* under the will, for the administration of the estate (*a*). By the decree made upon the hearing for further consideration, dated the 6th of *July*, 1858, it was referred to the Taxing Master to tax (amongst others) "the costs, as between solicitor and client," in the cause of Mr. *Little*, such costs "to include any costs, charges and expenses properly incurred by him in the execution of the trusts of the will of the testator.

The costs carried in on behalf of Mr. *Little* included his costs in his defence of three suits relating to the estate of the testator called *Newland* v. *Little*, *Burridge* v. *Deacle*, and *Payne* v. *Wrench*; but the Taxing Master declined to tax them under the general directions contained in the decree, he being of opinion that they ought to be specifically mentioned in the decree.

Mr. *Little* presented the present petition, praying that the Taxing Master might be ordered to tax the costs of these three suits.

These three suits were of the following nature:—The suit of *Newland* v. *Little* was instituted in the Equity Exchequer, in 1834, for the administration of the estate of the testator, and a decree was made in 1837 for the administration

(*a*) 26 *Beav.* 1.

1859.

PAYNE v. LITTLE.

administration of personal estate only. No report had ever been made, but, by the decree in the present suit, the accounts taken in *Newland* v. *Little* were to be adopted therein.

Burridge v. *Deacle* was instituted in 1827, for the purpose of establishing a lien of *Burridge* for his unpaid purchase-money, upon estates which *Payne* had purchased from *Burridge*, and had subsequently conveyed to the testator in his lifetime, and which the testator had before his death contracted to sell. In 1833 a decree had been made establishing *Burridge's* lien. *Payne* v. *Wrench* was a suit instituted in 1819 against the testator, and revived against his executors.

The costs, charges and expenses of *Little* in these suits had not been paid.

Mr. *R. Palmer* and Mr. *Speed*, in support of the petition, submitted, that Mr. *Little* was entitled to be paid, out of the estate of the testator, the costs, charges and expenses properly incurred by him as executor and trustee of the will, in and about his defence of the three several suits of *Newland* v. *Little*, *Burridge* v. *Deacle*, and *Payne* v. *Wrench*.

Mr. *Follett* and Mr. *Morris*, *contrà*, were not called on.

The MASTER *of the* ROLLS.

I have no doubt that the Taxing Master is right, and that he could not tax these costs under this order. It would be opening the whole matter.

I must make the Petitioner pay the costs of this petition.

1859.

TROWARD *v.* ATTWOOD.

June 8.

When the matters in dispute have been disposed of by an independent proceeding, the Plaintiff may apply to stay proceedings, and the Court will then dispose of the costs. But where the suit has been dismissed against some of the Defendants for want of prosecution, the Court is no longer able to adjudicate as to the costs, in the absence of the dismissed parties, and in default of prosecution, the bill will be dismissed in usual way, with costs.

SOME of the Defendants had already procured the bill to be dismissed against them for want of prosecution. Other Defendants now moved to dismiss the bill, as against them, for want of prosecution.

Mr. *Wintle*, for the Plaintiffs, stated, that they had abstained from prosecuting the suit in consequence of the rights of the parties having, pending this suit, been determined in another cause (*a*). He argued, that the questions between the parties having been disposed of by an independent proceeding, this suit ought either to be dismissed without costs, as in *The Sutton Harbour Company* v. *Hitchens* (*b*); or that the Defendant's costs ought to be added to their security.

The MASTER *of the* ROLLS.

Where, pending a suit, the matters in litigation are disposed of by an independent proceeding, as by an Act of Parliament or otherwise, the Plaintiff may apply to the Court and stop the prosecution of the cause. The Court will then look at the record and the other facts, and dispose of the costs, either by staying the suit with or without costs, or make such order as may be right. But the Court can only deal with the merits of a cause in the presence of all the parties, and if the Plaintiff

(*a*) *Perry Herrick* v. *Attwood*, 25 *Beav.* 205; 2 *De G. & J.* 21; *Lloyd* v. *Attwood*, 33 *L. T.* 209.

(*b*) 15 *Beav.* 161.

1859.

TROWARD v. ATTWOOD.

Plaintiff waits until one of the Defendants has been dismissed and is no longer a party to the suit, the Court cannot then make any order to his prejudice, which would be the effect of ordering the costs of a Defendant to be added to his security.

Here it is impossible to determine the merits of this cause between the Plaintiffs and one only of the Defendants, and all I can do is, to make the usual order to dismiss for want of prosecution with costs.

SMITH *v.* PEPPER.

June 24, 25.

Bequest to each of *A.*'s sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in existence at my death, to go to their respective descendants. *Held*, that the descendants of a sister who was dead at the date of the will were excluded.

Bequest to "descendants" of *A.*, "in such proportions as each may be entitled" under the statute of distributions. *Held*, that a child of *A.* took in exclusion of grandchildren.

STEPHEN FRANCIS, by his will, dated the 27th of *July*, 1857, appointed the Plaintiffs his executors, and (among other legacies) bequeathed as follows:—"And in regard to the relations of my dear departed wife, *Sarah Francis*, I give and bequeath *to each of her sisters and to her brother, or to such of them as may be living at the time of my decease*, 1,000*l.* each of stock in the Three per Cent. Consolidated Annuities, the said sum, in the case of those who may not be in existence at my death, to go to their respective *descendant or descendants, in such proportions as each may be entitled to under the laws which may then be in force for the distribution of unbequeathed property*; and if either of the sisters or brother aforesaid shall, at the time of my decease, have departed this life without leaving any descendant or descendants, I give and bequeath the share of such brother or sister to be divided, in the lawful proportions, amongst the remaining sisters or brother, or their descendant or descendants."

The

The testator bequeathed his residuary property to the Plaintiffs and *Edward Edwards* on certain trusts.

The testator died in *July*, 1858.

One of the sisters of the testator's wife, viz., *Mary Ann Pepper*, had died in 1844, and prior to the date of the testator's will. She left children, who were still living. This gave rise to the first question, whether the children of *Mary Ann Pepper* were, upon the true construction of the testator's will entitled to a legacy of 1,000*l.* Consols.

Another sister of the testator's wife, viz., *Amey*, died in *January*, 1858, that is, after the date of the will, but in the life of the testator. She left surviving her one child, *Amey Eliza Wybrow*, who had six children. This gave rise to the second question, whether *Amey Eliza Wybrow* was or was not entitled to the legacy of 1,000*l.* Consols, in exclusion of her children.

Mr. *Lloyd*, for the children of *Pepper*, argued that the descendants of such of the wife's sisters as died before the testator were entitled to a legacy of 1,000*l.*; and that it could not have been the intention of the testator to exclude the *Peppers* merely because their mother had died prior to the will. He cited *Tytherleigh* v. *Harbin* (*a*); *Ive* v. *King* (*b*); *Gaskell* v. *Holmes* (*c*); *King* v. *Cleaveland* (*d*); *Coulthurst* v. *Carter* (*e*).

Mr. *Selwyn*, for the children of Mrs. *Wybrow*, argued that the word "descendants" comprised issue of every degree, and that such children participated with their mother

(*a*) 6 *Simons*, 329.
(*b*) 16 *Beav.* 46.
(*c*) 3 *Hare*, 438.
(*d*) 26 *Beav.* 166.
(*e*) 15 *Beav.* 421.

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mother in the legacy. He cited *Crossly* v. *Clare* (*a*); *Butler* v. *Stratton* (*b*); and see *Roper on Legacies* (*c*), *Jarman on Wills* (*d*).

Mr. *R. Palmer*, for the residuary legatees. This is in the nature of a substitutionary bequest, and it cannot take effect in favor of descendants, unless the persons whom they represent could themselves have taken under the will. The descendants of sisters who were dead at the date of the will are, therefore, excluded, for they could not by possibility have been the objects of the original gift; *Jarman on Wills* (*e*); *Christopherson* v. *Naylor* (*f*); *Butler* v. *Ommaney* (*g*); *Gray* v. *Garman* (*h*).

The testator refers to persons who might be in existence at his death; but he knew at the date of his will that Mrs. *Pepper* was already dead, and could not be included. His object was to prevent a lapse, which could only happen in the case of the persons living at the date of his will. If he had inserted the sisters of the wife by name, it would have been absurd to include one who was then dead.

The MASTER *of the* ROLLS.

June 25. Upon a further consideration of the question in this case, I have come to the same conclusion as I expressed yesterday.

In the first instance, there is a bequest of 1,000*l.* each to the wife's "sisters and brother." I entertain no doubt that this can only mean persons living at the date

(*a*) *Ambler*, 397; 3 *Swan.* 320, *n.*
(*b*) 3 *Bro. C. C.* 369.
(*c*) *Vol.* 1, *p.* 136 (*4th ed.*)
(*d*) *Vol.* 2, *p.* 79 (*2nd ed.*)
(*e*) *Vol.* 2, *p.* 642 (*2nd ed.*)
(*f*) 1 *Mer.* 320.
(*g*) 4 *Russ.* 70.
(*h*) 2 *Hare*, 268.

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date of the will. The ordinary meaning of the words, and the rules of grammar, limit the gift to persons then alive. Then the testator, anticipating the possibility of some of them dying before him, adds "or to such of them as may be living at the time of my decease." "In the case of those who may not be in existence at my death to go" (that is, their shares are to go), "to their respective descendant or descendants;" that must mean, to go to the descendants of the persons of whom he had spoken before, and, if so, it is no more than a substitution of the "descendants" for a person before mentioned, in case he should not be alive at the testator's death. It is impossible to say, that this could apply to a person who was dead at the date of the will.

It is very possible that he intended to include all the sisters and their descendants, but he has not expressed it; and if I so decided, from a presumed intention gathered from other circumstances, I should be both making a will for the testator and upsetting the fixed rules of construction.

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June 27.

A. was tenant for life without impeachment of waste, with remainder to her issue in tail, with remainder to *B.* for life, with remainder to his issue in tail, with remainder to *B.* in fee. The Court directed some timber to be cut in the life of *A.*, and the produce to be invested. Both *A.* and *B.* died without issue. *Held*, as between the heir and executor of *B.*, that the timber money was realty, and belonged to the heir.

THE testator, by his will, devised some real estate to *Esther Field* for life, with remainder to her children in tail, with remainder to her brother *James Field* for life, with remainder to his children in tail, with remainder in fee to *James Field*.

The tenants for life were impeachable of waste.

The Court, in a suit for the administration of the estate, had, during the minorities of *Esther* and *James*, directed some timber, which was deteriorating, to be cut. The fund was brought into Court, and the income was directed to be paid to the tenant for life, with liberty to apply at her death.

James died without issue in *May*, 1853, leaving *Sarah* his heir, and she died without issue in *December* following.

The timber money was claimed both by the heir of *Esther* and the executor of *James*.

Mr. *Selwyn* and Mr. *Osborne*, for the heir at law of *Esther*, argued that the timber constituted part of the settled estate, and that the fund now representing it was, in the contemplation of this Court, of the nature of realty; that on the death of *James* and *Esther*, it descended with the estate itself, and now belonged to the heir.

Mr.

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Mr. *Shapter* and Mr. *Jones Bateman*, for the executor of *James*, argued that the timber, when severed, was converted into personalty, and belonged to the executor of *James*, in whom the inheritance was vested, and that being found in the nature of personalty, it devolved as such, there being no equity as between the real and personal representatives.

Mr. *Walford* for the trustee.

The MASTER *of the* ROLLS.

No doubt, where there is an estate for life, with remainder to *A.* in fee, something may happen in the life of *A.* which may turn part of the inheritance into a chattel interest; I do not dispute that proposition; but it is not so, where the Court, merely for the benefit of the estate, sells a part of the inheritance: that was exactly the case here, when it directed a part of the timber to be cut down and sold for the benefit of the several persons who were or might become owners of the estate. This lady was tenant for life, with remainder to her first and other sons in tail, with remainder to her brother for life, with the ultimate reversion to him in fee. The timber was cut down and the proceeds directed to be invested, and the dividends paid to her for life, with liberty to apply on her death. Her brother dying before her, the ultimate remainder in fee became vested in her. Upon that, it is said "the first estate of inheritance was vested in the brother, and that therefore he was entitled absolutely to the timber money" (*a*). If that were so, and she had had a child immediately after, the effect would have been to deprive him of a portion of the estate in which such child would then have the first estate

(*a*) *See Lushington* v. *Boldero, and the cases cited* 15 *Beav.* 1.

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estate of inheritance. If the eldest child had died an infant before the death of the tenant for life, would the interest of the timber money vest in that child, or would it not pass on to the next child? It is clear that the person in whom it vested was the person absolutely entitled to the inheritance at the time when the estate of the tenant for life fell in.

It is like the case where part of an estate has been taken by a railway company for the purpose of the railway, and the purchase-money has been invested in Court, and the income directed to be paid to the tenant for life; in that case, the capital would belong to the person who had the first estate of inheritance in possession upon the death of the tenant for life; and so it is with regard to timber.

I entertain no doubt that this timber money was, in the view of this Court, vested in *Esther* in fee simple, and of the nature of real estate, and assuming nothing was done to convert it into personalty, in the meantime, that it remained so at her death.

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Nov. 10, 20.

Sums advanced by a testator to his children on their marriage, and to establish them in business. *Held*, a satisfaction *pro tanto* of their shares of the residue bequeathed to them by his will; but *secus* as to small gifts made, from time to time, by the testator to such children.

THE testator, Mr. *Heap*, by his will dated in 1840, gave and devised his real and personal estate and effects to his eight children, *Jonathan*, *Ruth*, *Edward*, *Sarah*, *John*, *Agnes*, *Mark* and *Frederick*, with gifts over to their respective issue, and cross remainders in particular events.

The testator died in 1855.

The bill was filed by the surviving husband of *Ruth* and her children, praying for the administration of the estate, and that the advances made by the testator to some of his children, in his lifetime, might be accounted for.

Four of the sons, *John*, *Edward*, *Mark* and *Frederick*, who were administrators, by their answer, stated as follows:—

"We say, that during the period of fourteen years and upwards that elapsed between the date of the will and the time of the testator's death, the testator, as we believe, and according to the best of our recollection, has occasionally given money to his children, or some or one of them respectively, by way of spontaneous favor and kindness, and free gift, but not by way of portion or advancement, or in contemplated diminution of any benefit which such children or child might otherwise be entitled to under the provisions of his will."

And

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And in the third schedule they set forth "the several sums of money so, by way of spontaneous favor and kindness, and free gift, given to or advanced for the benefit of his children, and the times when the same were so given and advanced. And we say, that we have found no entry or memorandum of the fact, amount or particular of any such pecuniary gift among the books, papers or writings of the testator which have come to our hands as such administrators and personal representatives of the testator, save and except the particulars of four several sums of 525*l.* 14*s.* 10*d.*, 114*l.* 8*s.* 1*d.*, 53*l.* 1*s.* 5*d.*, and 2*l.* 19*s.* 9*d.*, and which are respectively mentioned or referred to in the third schedule hereunto annexed. And we say, that such pecuniary gifts were never treated by him, or his children, or any of them, or intended to be treated or looked upon by the child or children receiving such gifts, respectively, as matters of debt or account, either as between the testator and such child or children, or other the children of the testator."

The schedule was similar to the one stated *post*, page 95.

By the decree, the following enquiry, amongst others, was directed:—"An enquiry whether any and what sums were paid by the testator, *John Heap*, after the date of his will, to or for the use or benefit of the testator's children, or of any and which of them respectively, and when and under what circumstances such payments (if any) were respectively made, and whether the same, respectively, or any and which of them were intended by the testator to be portions or advancements in life of such children respectively, or any and which of them. But this enquiry was to be without prejudice to any question in this cause."

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The Chief Clerk found as follows:—"The several sums mentioned in the third schedule hereto were paid by the testator *John Heap*, after the date of his will, to or for the use of the testator's daughters, *Sarah Robinson* and *Agnes Stead*, and of his sons, the Defendants *John Heap*, *Edward Heap*, *Mark Heap* and *Frederick Heap* respectively, at the times and under the circumstances stated in the third schedule. Such payments, respectively, were not intended by the testator to be portions or advancements in life of such children respectively, or any or either of them." He stated that the evidence produced on this enquiry consisted of the answer of the four Defendants above referred to.

The third schedule was as follows:—

	£	s.	d.
The testator gave to his daughter *Sarah Robinson*, on and after her marriage .	600	0	0
The testator gave to his daughter *Agnes Stead* on her marriage, 300*l.*, and various sums since, making together . .	580	0	0
The testator gave to his son *Jonathan* various small sums at different times, and on many occasions, the amount thereof cannot now be ascertained, but estimated to be about but not exceeding . .	50	0	0
The testator gave to his sons, *Mark Heap* and *Frederick*, the sum of 1,000*l.*, on or shortly after their commencing business as cloth manufacturers, about 1850 or 1851, on their own account, after the dissolution of partnership with him, in the following manner:—The testator first gave security for them to the *Huddersfield Banking Company* for 1,000*l.*,			

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	£	s.	d.
1,000*l.*, and he accordingly drew upon the bank to that amount; and then the testator, some time afterwards, paid that sum into the bank	1,000	0	0
The testator also gave to his sons, ***Mark*** and ***Frederick***, whilst in business on their own account, between the years 1850 and 1853 inclusive, various other amounts, besides the said sum of 1,000*l.* last above mentioned, in money and goods, and in the use of his horses and carts for journeys, altogether amounting to 525*l.* 14*s.* 10*d.* or thereabouts, full particulars of which are to be found in one of the testator's private memorandum books in Defendants' possession; but Defendants state, it was always considered and believed that the last-mentioned amount was advanced, paid and allowed, from time to time, by the testator to his sons, ***Mark*** and ***Frederick***, to assist them in commencing business, which he had always promised to do, and in lieu and satisfaction of their partnership share of the stock and effects in their previous partnership with the testator, which was dissolved in the year 1850, they never having received any part or share of such stock and effects upon dissolution	525	14	10
The testator gave to his son, ***Mark Heap***, various amounts in money and goods, and at different times between the years 1850 and 1855 inclusive, amounting to about, but not exceeding in the whole, the			

	£	s.	d.
the sum of 200*l.*, particulars of part whereof, amounting to 114*l.* 8*s.* 1*d.*, are to be found in one of the testator's private memorandum books in Defendants' possession; and it is stated that there are no other books or papers shewing any of the particulars of the said sum of 200*l.*, or any part thereof	200	0	0
The testator gave to his son *Frederick Heap* various amounts in money and goods at different times between the years 1850 and 1855 inclusive, amounting to about, but not exceeding in the whole, the sum of 100*l.*, particulars whereof, amounting to 53*l.* 3*s.* 5*d.*, are to be found in testator's private memorandum book in Defendants' possession . . .	100	0	0
The testator gave to his son *John Heap*, to pay for wool purchased by him of Messrs. *Susman & Co.*, 52*l.*; and there are sundry small items appearing in the testator's private memorandum book, in Defendants' possession, against his son *Edward*, amounting to 2*l.* 19*s.* 9*d.*, altogether	54	19	9

The cause came on for further consideration, and on a summons to vary the certificate,

Mr. *Bagshawe* and Mr. *Bagshawe*, jun., for the Plaintiff, insisted that all the several sums advanced by the testator in his lifetime to his children ought to be taken in satisfaction *pro tanto* of their shares of the residue.

Mr. *J. H. Humphries* for *John Heap*.

Mr.

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Mr. *Lloyd* and Mr. *M. A. Shee*, for the Defendants, argued, that on the evidence now before the Court, the sums mentioned in the third schedule could not be taken as in satisfaction of the provision made by the testator for his children, as they had not been advanced by him with any such intention, but on the contrary.

Ferris v. *Goodburn* (*a*); *Lady Thynne* v. *The Earl of Glengall* (*b*); and see *Kirk* v. *Eddowes* (*c*), were cited.

The MASTER *of the* ROLLS considered, that the natural and legal presumption was, that the sums of 600*l.* and 300*l.* advanced by the testator on his daughter's marriage, and the sum of 1,000*l.* advanced by him to establish his two sons in business, were advancements; that this presumption was not rebutted by the statement of the parties principally interested, and that they must therefore be accounted for.

But he considered that the same presumption did not apply to the small gifts made by the testator from time to time to his children.

(*a*) 4 *Jur. N. S.* 847.
(*b*) 2 *H. of Lords Ca.* 131.
(*c*) 3 *Hare*, 509; 2 *Leading Cases in Equity*, 282—284.

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Feb. 25, 26.

Under a will, the shares of children became absolutely vested at twenty-one, but the fund was not divisible until the death or second marriage of the widow. The will directed, that in case of the death of any of the children leaving lawful issue surviving, the share of the parent should go to the children of such parent. *Held*, that the gift over to the grandchildren had reference to the period of division, and not to the period of the vesting of the children's shares, and that it then ceased to operate.

A gift of a share of a residue to a child: *held*, *pro tanto*, satisfied by a provision made by the testator on her marriage after the date of the will.

THE testator, by his will, dated in 1842, devised and bequeathed all and every his real estate, and the policies on his life and all other his personal estate and effects to three trustees and their heirs, &c., upon trust to convert his personal estate into money. And he declared that they should stand possessed of his personal estate and the rents of his real estate, upon trust to pay, out of the income, an annuity of 500*l.* to his wife, "for so long time as she should continue his widow, for the maintenance of herself and for bringing up, maintaining and educating" his children; and that they should pay another annuity of 30*l.* to her sister-in-law for life. And he directed the overplus of rents and income to be, from time to time, placed in some good bank, and when it should amount to 500*l.*, to be invested.

He then proceeded in the following terms:—"And from and immediately after the death or marriage again of my said wife, then upon further trust to apply such part of the said rents, interests and annual proceeds, for the maintenance, education and advancement in life of all my said child and children as shall be then under the age of twenty-one years, as they, in their discretion, shall see necessary and proper, and when the youngest of my said children shall attain the said age, then upon further trust to call in all my moneys, and pay, divide, distribute and convey all my property between my children,

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children, share and share alike, save and except so much as will secure to my said wife (if she shall be then alive and married) an annuity or yearly sum of 100*l.*, as hereinafter mentioned; and at her death, the principal thereof I do hereby direct shall be equally divided amongst my children as hereinbefore mentioned. But in case my said children cannot agree about the division of my said real estate, then I direct my said trustees," &c., to sell the same, " and to divide and distribute the money arising therefrom between my said children as aforesaid. And in case of the death of any of my said children, leaving lawful issue him, her or them surviving, then it is my will and mind that the share or shares of such deceased parent or parents shall go to the child or children of such parent." " Provided always, that in case my said wife shall marry again, I direct the said annuity or yearly sum of 500*l.* shall cease, and in lieu thereof I give and bequeath to her an annuity or yearly sum of 100*l.*, to be paid to her half-yearly as aforesaid, for her own sole use and benefit, for the term of her natural life," " and on each of my said children attaining the age of twenty-one years, I direct the sum of 500*l.* shall be paid to him or her so coming of age out of accumulation of my property, which will have *accumulated* beyond paying my said wife's annuity of 500*l.* And I hereby give power to them, my said trustees, to advance such further sum or sums of money (with the consent of my said wife, in case she shall be then my widow) as they, in their judgment, shall consider prudent and proper, for the advancement in the world of such my son and daughter or sons and daughters respectively so coming of age as aforesaid; and such 500*l.* and other sum and sums so advanced shall go in part and be accounted for and deducted from his, her or their share under this my will."

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The testator died in 1844, leaving seven children, two of whom attained twenty-one in his life, and of the rest, the youngest attained twenty-one in 1858.

The testator's daughter *Jane* was the only one who had ever been married. She married Mr. *Longshaw* in 1843, and on that occasion, the testator assigned to trustees a policy on his life for 2,000*l.*, on certain trusts for her, her husband and issue, and he covenanted to pay the premiums. After his death, the 2,000*l.* was paid to the trustees.

Various questions had been raised as to the rights and interests of the parties interested in the testator's estate in the events which had happened: first, at what time the shares of the testator's children became or would become absolutely and indefeasibly vested; secondly, whether the gift over, in case of the death of any of his children leaving lawful issue them surviving, was still subsisting as to any of the testator's children, and if so, when it would cease so to be; thirdly, whether, if the shares of the testator's children were now absolutely and indefeasibly vested, such children were entitled to require a transfer and payment of such shares during the lives of the annuitants; fourthly, whether the trusts for accumulation were still subsisting, and if so, when they would terminate; fifthly, whether any and what interest was chargeable, and from and to what times, upon any sums advanced or to be advanced to the children; lastly, what was the effect of the settlement made by the testator upon the marriage of his daughter *Jane*, as respects the rights of *Jane Longshaw* or her issue to participate in the testator's estate under the trusts of the will.

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The bill prayed a declaration of the rights of the parties.

Mr. *R. Palmer* and Mr. *Little* for the Plaintiffs, five of the testator's children.

Mr. *Bardswell* for the executors and trustees.

Mr. *Roche* for the widow.

Mr. *Rowcliffe* and Mr. *Dickinson* for *Joseph Beckton.*

Mr. *Bazalgette* and Mr. *C. Hall,* for the testator's daughter *Jane* and her husband.

Mr. *Follett* and Mr. *Piggott* for their five children.

The following authorities were cited :—

In re Williams (*a*); *Tribe* v. *Newland* (*b*); *Earl of Newburgh* v. *Eyre* (*c*); *Bouverie* v. *Bouverie* (*d*); *Brocklebank* v. *Johnson* (*e*); *Leeming* v. *Sherratt* (*f*); *Woodburne* v. *Woodburne* (*g*); *Edwards* v. *Edwards* (*h*); *Abbott* v. *Middleton* (*i*); *Freemantle* v. *Banks* (*k*); *Farnham* v. *Phillips* (*l*); *Davys* v. *Boucher* (*m*); *Pym* v. *Lockyer* (*n*); *Hervey* v. *M'Laughlin* (*o*); *Thynne* v. *Earl of Glengall* (*p*); *Salisbury* v. *Petty* (*q*).

The MASTER *of the* ROLLS.

Feb. 26. The first question which arises on this will is, at what time

(*a*) 12 *Beav.* 317.
(*b*) 5 *De G. & Sm.* 236.
(*c*) 4 *Russ.* 454.
(*d*) 2 *Phillips,* 349.
(*e*) 20 *Beav.* 205.
(*f*) 2 *Hare,* 14.
(*g*) 3 *De G. & Sm.* 643.
(*h*) 15 *Beav.* 357.
(*i*) 21 *Beav.* 143.
(*k*) 5 *Ves.* 79.
(*l*) 2 *Atk.* 215.
(*m*) 3 *You. & C.* 397.
(*n*) 5 *Myl. & Cr.* 29.
(*o*) 1 *Price,* 264.
(*p*) 2 *H. of Lords Cases,* 131, 153; 5 *Beav.* 245.
(*q*) 3 *Hare,* 86.

time the shares of the children became vested; and the second, at what period the gift over to the issue is to take effect.

It appears to me that the period of vesting depends on whether the clause directing a division of the property is governed by the words "and from and immediately after the death or marriage of my said wife," that is, whether the division is to take effect immediately upon the youngest of the children attaining twenty-one.

I am of opinion, that the only mode of reading this will without inconsistency, is to say, that the division is to take effect upon the death or marriage of the widow, and that it is not to take effect absolutely on the youngest of the children attaining twenty-one. This appears to me clear when the whole will is read together, although, undoubtedly, the provisions in it are somewhat peculiar, and in many respects inconvenient.

The testator gives an annuity to his wife during her widowhood, and he directs the "surplus" income to be accumulated, evidently to provide a fund for the advancement of his children. The accumulation is to go on as long as the annuity continues; there is nothing whatever else to limit its duration. After the death or marriage of his widow, he gives his trustees a discretionary power to apply the income towards the maintenance, education, and advancement of his children, while minors, and when the youngest attains twenty-one, they are to divide the property between the children, "save and except so much as will secure to my

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my said wife (if she shall be then alive and married) an annuity or yearly sum of 100*l.*, as hereafter mentioned."

Why is the annuity of 500*l.* a year to the wife to be cut down to 100*l.* a year, merely because the youngest of the children may have attained twenty-one years? It is obvious that cannot be the meaning of these words; and accordingly, if this clause means that the money is to be imperatively divided on the youngest of the children attaining twenty-one, it must be held, that the testator has omitted the words, "and in case she shall not be married again, then subject to her annuity of 500*l.*" But he has not said anything of the sort, and I cannot make a will for the testator and introduce those words, especially when the whole is consistent and free from repugnancy if the words, "after the death or marriage again of my said wife," govern the whole sentence.

In case of his wife's marriage, he reduces her annuity from 500*l.* to 100*l.*, and he then directs 500*l.* to be paid to each child on coming of age, "out of accumulation of my property, which will have accumulated beyond paying my said wife's annuity of 500*l.*" And then follows a power to the trustees, with the consent of the wife (in case she shall be then a widow), to advance any further sum for the advancement in the world of the children of age, and he directs said advancement to be taken as part of their shares.

I think the scope and meaning of the will is clear. The widow is to have 500*l.* a year for her life if she should not marry again; and in that event, according as every child attains the age of twenty-one years, when

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when his share becomes absolutely vested, he is to receive 500*l.*; and the trustees may, with the consent of the widow, allow that child a further sum for his advancement in the world. This is to go on until the death of the widow, when the whole of the accumulated fund is to be divided among the children, each of them bringing into hotchpot the sums they have already received. But if the widow should marry again, then, though up to the time of the youngest child attaining twenty-one, the clauses with respect to the elder children receiving 500*l.* and being advanced in life remain in force, yet, upon the youngest child attaining twenty-one, the whole division is to take place. I am of opinion that this mode of reading the will does not require a word to be added to or omitted from it to make it consistent; and though, in some events, it may be inconvenient, as it suspends the distribution of the fund until after the death of the widow, yet the Court cannot avoid that conclusion, if, as I think, the testator has expressly so directed it.

I am of opinion, upon the authority of the cases, which I considered very fully in the case of *Edwards* v. *Edwards* (*a*), that the period which is spoken of in the sentence, "and in case of the death of any of my said children, leaving lawful issue, him, her or them surviving," refers to their death before the distribution of the fund; and, accordingly, it means before the death or marriage of the widow, and the period when the youngest child attains twenty-one.

As to the question whether there was an advancement made to the daughter by the father upon her marriage, in *November*, 1843, a little less than a year before he

(*a*) 15 *Beav.* 357.

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he died, I have no doubt that it was an advancement. I am of opinion that the case of *Lord Edward Thynne* v. *Lord Glengall* (*a*), is decisive on the point, and removes any question as to whether the doctrine could obtain in the case of a residue. I think it impossible to draw the distinction which Mr. *Bazalgette* endeavoured to press upon me, that though the doctrine would prevail where the will followed the advancement, it would not where the advancement followed the will. In my opinion those cases are exactly the same. The testator must be taken to have known what he had done by the previous instrument which he had executed; and, whether the previous instrument were a will or a deed, does not, in my opinion, affect the questions of whether the advancement is effectual or not. Therefore I am of opinion that this lady must be put to her election, whether she will choose to take under the will, and, in that case, bring into hotchpot the money that she has received.

(*a*) 1 *Keen*, 769; 2 *H. of Lords Cas.* 131.

ABSTRACT OF DECREE.

Declare that the trust for accumulation is directed to be made during the entire continuance of the widowhood of the Defendant *Jane*; but that under the *Thellusson* Act, such accumulation cannot be lawfully made beyond twenty-one years from the testator's death.

Declare that the trust for accumulation will continue until the death or marriage again of the widow, in case either of such events shall happen before the expiration of the twenty-one years.

Declare that, subject to the trusts for accumulation, the *corpus* has become absolutely vested in the seven children, all of whom have attained twenty-one, but that the shares are not payable until the death or second marriage of the widow, but are liable to be divested in the contingency next mentioned.

Declare that the trust for the children of children is subsisting, and will continue in operation, in case of happening of the event provided for, until the death or second marriage of the widow, and that such trust will then cease.

Declare the settlement on the daughter *Jane* an ademption or satisfaction of her share under the will, and to be brought into hotchpot, but without interest.—*Reg. Lib.* 1858, *A. fol.* 1824.

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March 22, 26.

THE Right Honorable *John Reginald Pindar*, Earl *Beauchamp*, by his will, gave as follows:—"And whereas I have contemplated erecting and endowing almshouses, either upon some part of my estate or elsewhere in the Hamlet of *Newland* aforesaid, for the residence of twelve or some larger number of poor men and women, members of the Church of *England*, who shall have been employed in agriculture, and have been reduced by sickness, misfortune or infirmity: now, in case I should happen to die without effecting such object, and any persons or person should, within twelve months after my decease, at their, his or her expense, purchase or give a suitable piece of land in *Newland* aforesaid as a site for such almshouses, and with the intent that the same should be devoted for such purposes, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land shall have been legally dedicated to charitable uses, provided they, he or she shall approve the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity, out of such part of my personal estate as is hereafter mentioned, the sum of 60,000*l.*, to be by them devoted to the several purposes of the charities, in the manner to be determined in respect of the funds of the same, but so nevertheless, that

Principles on which the Court proceeds in settling a scheme in charity cases. If the testator has clearly pointed out his intentions, the Court is bound to carry them into effect. But where the property is devoted to charity generally, or there are accretions of the charity funds not specifically disposed of, or where the particular charity wholly fails, the Court has a discretion.

A charity was founded for almshouses for poor men and women "reduced by sickness, misfortune, or infirmity." *Held*, that this did not authorize the Court, in settling a scheme, to sanction the building of a hospital or infirmary with accommodation for the almspeople.

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that the said sum or any part thereof shall not be applied in or towards the purchase of any lands for the purposes of such charity.

"And if and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such the scheme of the intended charity, or the rules and regulations for the government thereof shall not, in the opinion of the majority of my said trustees, be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l.* to the trustees for the time being of *St. George's Hospital*, situate at *Hyde Park Corner*, in the county of *Middlesex*, to be by them applied to the purposes of that Institution."

The testator died in 1853, without having effected his object in his lifetime. After his death, a suitable piece of land was given and dedicated to the charity by the Hon. *C. Grantham Scott*. The validity of the bequest having been questioned, it was, in the first instance, held to be opposed to the Statute of Mortmain, and invalid (*a*), but the House of Lords, on appeal, supported the charitable bequest (*b*).

It was accordingly ordered, on the 20th of *January*, 1858, "That a proper scheme for the future management of the charity be settled and approved by the Judge of this Court, to whom this cause is attached, having regard to the provisions of the will of the testator."

The Chief Clerk made his certificate, approving a scheme, which contained the following clauses:—

"18. The

(*a*) 21 *Beav.* 134. (*b*) 6 *H. of Lords Cas.* 338.

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"18. The trustees shall cause to be erected, on the piece of ground in the parish of *Newland* given for that purpose by the Honorable *Charles Grantham Scott*, and according to the plans to be approved of by the Court of Chancery, good and substantial almshouses, to be called 'The *Beauchamp* Almshouses,' to contain a house for a chaplain, a board room, and other necessary offices, and accommodation for twenty-four almspeople, as hereinafter mentioned; that is to say, eight sets of rooms (each set consisting of a sitting-room, bed-room, and a small pantry or washhouse), for married couples, eight sets of rooms for single men or widowers, and eight sets of rooms for spinsters or widows. The building shall also contain accommodation for a matron and a porter. The trustees shall furnish the building with all such appropriate furniture as to them, from time to time, shall seem fit, provided that the first cost of executing and furnishing such almshouses shall not exceed the sum of 12,000*l.* The amount to be so expended shall be raised out of the principal funds of the charity."

"22. The almspeople shall consist of eight married, eight single men or widowers, and eight spinsters or widows, and none shall be admitted as almspeople under the age of fifty-five years, nor shall any married almsman be admitted whose wife is under fifty years of age. The almspeople shall be poor persons of good religious and moral character, and members of the Church of *England*, and, subject to the provisions hereinafter contained, persons who have been engaged in agriculture, either as employers or employed, and have been reduced to poverty by sickness, misfortune or infirmity."

In settling the scheme, the Attorney-General had proposed

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proposed that the building should consist of a centre and two wings; the centre to be devoted to the use of a chaplain and the necessary offices, and the two wings, one to be called *The Almshouse Wing*, and the other *The Hospital Wing*. These wings were to be fitted up for the accommodation of twenty-four almspeople; twelve of whom were to consist of persons labouring under some permanent or chronic disease. He also proposed that there should be a nurse in addition.

The Attorney-General took out a summons to vary the certificate in manner following:—"By providing, in the scheme approved of in the certificate, for the appropriation of some portion of the building to be erected, as provided in the certificate, to the purposes of an infirmary or almshouse for sick or disabled persons, with directions for management adapted to such appropriation."

The matter was referred into Court.

Mr. *R. Palmer* and Mr. *T. H. Terrell* for the *Attorney-General*, in support of the summons to vary the scheme, argued that the proposed variation of the scheme would best effect the wishes of the testator, and that it was warranted by the terms of the gift, and would be more beneficial to the objects of the charity, and that the Court, in the settlement of the scheme, had full jurisdiction to sanction it.

Mr. *Lloyd* and Mr. *Wickens*, for the trustees, argued that the effect of the proposed variation in the scheme was altogether to change the character of the charity from almshouses to a hospital or infirmary. That this

was

was contrary to the expressed wishes of the founder, and was disapproved of by the trustees.

Mr. *C. T. Simpson*, for the Defendants, except *St. George's Hospital*, against whom proceedings had been stayed.

Mr. *R. Palmer*, in reply.

The MASTER *of the* ROLLS.

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The cases of *Philpott* v. *St. George's Hospital* and *Ashton's Charity* are so connected together with respect to the observations I have to make, that I propose to give my judgments upon them conjointly. Having come to what would, *primâ facie*, appear to be opposite conclusions in the two cases, it becomes important that I should explain the principle on which I proceed, and which, in my opinion, regulates cases of this description. It has, I think, of late, been sometimes considered, that whenever the Court had to direct a scheme to be framed for the establishment of a charity, it had power to deal with the property as it pleased, and in point of fact to do anything, which, within certain limits, it thought expedient to be done with the property. A more erroneous opinion, and one less in accordance with the decisions of this Court in matters of charity, can hardly be conceived. The confusion and error have arisen from this,—that the Court has an unlimited power and discretion or nearly so, in some cases, in which it makes a scheme, but that in other cases it has not. The distinction consists in this:—If the

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the testator has, by his will, pointed out clearly what he intends to be done, and his directions are not contrary to the law, this Court is bound to carry that intention into effect, and has no right and is not at liberty to speculate upon whether it would have been more expedient or beneficial for the community that a different mode of application of the funds in charity should have occurred to the mind of the testator, or that he should have directed some different scheme for carrying his charitable intentions into effect. Accordingly, instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect.

But there are other cases where the testator has devoted funds to charity generally, and has not specified any particular charity or application of the funds. In these cases the Queen, by her sign manual, directs the charity to be carried into effect by the Attorney-General or by this Court, which then has the full power to adopt any scheme which the Attorney-General, after considering the matter fully, should deem expedient. So, also, where there are accretions to a charity, which are not specifically disposed of, the Court, in that case, may, to some extent, act in a similar way. So, also, where a fund is given for a particular object, which entirely fails, as in the case of *Lady Mico's Charity* (*a*), where a large property was given for the redemption of Christian slaves in *Barbary*, and the charity failed for want of objects. In these cases, the Court, under what is called the doctrine of *cy-près*, may regulate the application of the charity funds consistently with the law of the country and the view of the Attorney-General. But in this case of *Philpott* v. *St. George's Hospital*, the Court has to carry into effect a charity founded

(*a*) 2 *Beav.* 317, *n.*

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founded by the testator himself, and therefore it is not in a position to do what it pleases, but it must do that which is in accordance with the will of the testator.

The testator, by his will, recites that he had contemplated "erecting and endowing almshouses for poor men and women, reduced by sickness, misfortune or infirmity," and then he proceeds to say, that in case any person should give "a site for such almshouses," then 60,000*l.* is to be "devoted to the several purposes of the said charity." He also gives a considerable discretion to his trustees as to "the scheme of the intended charity, and the rules and regulations proposed for the government thereof."

The land having been given, a scheme has been framed for founding almshouses. But the Attorney-General, to whose opinions and suggestions this Court, in all cases, pays the greatest regard, suggests an addition to the almshouses, which would, in his and probably in the opinion of most persons, be a more beneficial application of the fund than simply giving it for almspersons, generally, who are reduced to poverty by reason of "sickness, misfortune or infirmity;" and what is proposed by him is something in the nature of an hospital to be attached to them; but I find nothing in the will of the testator to warrant this. It occurred to me, in the course of the argument, that I might, to a certain extent, adopt the view of the Attorney-General, still making it an almshouse, by directing that the trustees should have regard, in the first instance, and give priority to persons who were reduced by "sickness or infirmity," over those who were reduced by "misfortune." But upon looking through the will, I do not think there is anything in it which justifies even that

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that view of the case. No doubt the approbation of the trustees is a matter of importance, but only because the testator has entrusted them with considerable discretion, for otherwise the whole discretion would be vested in the Court. I regard their opinion in the matter with very considerable respect. They are opposed to this variation of the scheme, not considering that it comes within the scope of the will. I also think that there is not anything in the will to give precedence to one applicant over another, I am of opinion that they must all stand on their own footing, always considering that the trustees themselves, in the selection of the objects, will be regulated by that which they think will be most beneficial to the community.

Accordingly, in the case of *Attorney-General* v. *Philpott*, I am of opinion that I cannot vary the scheme in the manner proposed, but the scheme must stand as it is.

It was a proper case to be brought before the Court, and the costs of all the proceedings must be paid out of the charity.

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RE ASHTON'S CHARITY.

March 26.

A testatrix made provision for six almsmen and for other charitable objects, and she gave the residue of the income to the six almswomen. The income having greatly increased, *Held*, that the almswomen were not entitled to the surplus income, as the effect would be to defeat the intention, by making them cease to be almswomen. *Held*, also, that the other objects were not entitled thereto, but that it was applicable to charity generally, and that the foundation of a school was a proper object to apply it to.

THIS case was argued before the Master of the Rolls, in Chambers, by

Mr. *T. H. Terrell* and Mr. *Wickens* for the several parties.

His Honor reserved his judgment, which he now delivered in open Court.

The MASTER *of the* ROLLS.

The observations I have made in *Philpott* v. *St. George's Hospital* (*a*) apply in a great measure to the case of *Ashton's Charity*, which was a case argued before me in Chambers. I was desirous to mention it in Court for the purpose of explaining my views on the subject as well as from its connection with the other case.

The case of *Ashton's Charity* was this:—A lady, before the passing of the Mortmain Act, left a very considerable property for the purpose of founding certain almshouses at *Dunstable*. The words of her will are these:—She appoints six trustees, and devises this property

(*a*) *Ante*, p. 107.

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property to them, upon trust that the said *Thomas Ayrescombe* and the five others therein named should settle the same as a fund and provision for raising and paying the sum of 6*l.* per annum for the use of each and every the six almswomen, to be harbored in certain almshouses therein mentioned, as by her then lately built at *Dunstable*, who she willed should be such as attended the worship of *God* in the Church of *England* on the *Sabbath* day at *Dunstable*, for buying them a gown and petticoat, all of the same colour, and for their firing and other necessaries, payable quarterly; and also a further fund for repairing the said almshouses from time to time, and paying 1*l.* yearly for a dinner for her trustees; and also to raise a fund of 5*l.* 4*s. per annum*, to be by 2*s.* per week laid out in bread, to be by the minister and churchwardens of the parish of *Dunstable* weekly, every *Sunday* after morning service, distributed among so many poor of the said parish of *Dunstable* which were the most constant at Divine service in the church, as they should think fit. And also for raising 1*l.* 10*s.* a year for ever, or more, when there should be really occasion for more, for or towards repairing, cleaning or keeping in repair a clock, which the testatrix had given or set upon the schoolhouse at *Dunstable*. And she willed *that the remainder of the rents and profits* of the said farm, lands and premises should be yearly divided and distributed unto and amongst the six almswomen in the six almshouses by her built at *Dunstable*. That is the whole of the gift and the material words are those with respect to the residue.

She also, by her will, founded another charity in these terms:—And in case her said daughters should die without issue living at her death, then, after her death,

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death, the testatrix gave and devised to the said *Thomas Ayrescombe* and the four others therein named, and their heirs, all the residue of her messuages, lands, tenements, hereditaments and real estate not thereinbefore particularly disposed of, upon trust annually, in the month of *January*, to pay and apply one equal moiety of the rents and profits of the last-mentioned premises, after all charges and expenses concerning the same should be deducted, for and towards the relief and support of thirty poor clergymen's widows, of sober life and conversation, such as the trustees should think the most deserving.

In 1848, a scheme was approved of by this Court for the purpose of carrying into effect these charities, and which very properly kept the charities perfectly distinct. It appointed five trustees, who are trustees of both charities; but it appointed three others, who were trustees merely of the charity in favor of clergymen's widows. So that, in point of fact, there were eight of one and five of the other; three belonging exclusively to the latter, and five trustees belonging to both. It kept the two estates perfectly distinct, and it gave precise and express directions for that purpose, and it gave express directions as to what was to be done with the property. The testatrix died in 1728, or about a century and a quarter ago, and since that time this has occurred:— A considerable portion of her property was at *Luton*, and by reason of the great increase of the value of the property at *Luton*, although the income of the charities remains the same as it was before, 6,000*l.* has lately been produced by the sale of outlying property for the purpose of building. Accordingly this sum of 6,000*l.* is now to be applied by this Court for the purposes of the charity, and the question is, in what way. There are

two

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two proposals before me; one is, that the 6,000*l.* shall be applied solely for the purpose of the second charity, that is, in favor of clergymen's widows. Another is, that it shall be applied entirely for local purposes in the neighbourhood of *Dunstable*, either in increasing the almshouses, or in founding a school, in which case, *Luton* puts in this claim and suggests, that as the property came principally from *Luton*, it would be but equitable that *Luton* should have a considerable share, and that a school should be founded at *Luton*. If a school is approved of, then the mode and the direction of the school is a matter of amicable contest. It is suggested on all hands, that if there is to be a school, it is to be rigorously and strictly a Church of *England* school, it being very obvious, from the will, what the views and opinions of the testatrix were. On the other hand, it is suggested that although it should be a Church of *England* school, yet that the children of Dissenters should be admitted to instruction, upon the usual terms on which the Court has been in the habit of providing for such a matter in schemes for the establishment of Church of *England* schools.

The first question is, whether the testatrix has disposed of this surplus? She says that the residue is to be given to "the six almswomen in the six almshouses." Therefore the residue is not to be applied for an additional number of almshouses or an additional number of almspeople, but it is to those six almswomen. But I apprehend that the additions to the increase of almswomen must have some limit. Suppose the increase of the property be increased to 6,000*l.* a year, was each almswoman to have 1,000*l.* a year? if so, she would then cease to be an almswoman. It is clear that this could not have been the object of the testatrix, because the person

person so receiving it would be far beyond the condition of an almswoman. The Court then must deal with this case, as in many others of an indefinite character, such as those relating to "notice" and "time," and determine what is the reasonable limit to be put on the income of the almswomen. I am of opinion that if this money were divided amongst the almswomen, they would thereupon cease to be almswomen, and that such an application of the residue would not have the effect intended by the testatrix, but would destroy her object. So far from being persons taken from a low rank in life, they would then be persons from a higher rank, and instead of being almswomen they would be persons receiving a considerable income, especially if, as is probable, the income should go on increasing for a considerable length of time.

It is to be observed, that the whole of this property is given to the almswomen, and that no portion of it is given to the other objects of the charity; if therefore it is not to go to the almspeople, it comes exactly into the situation of property devoted to charity, but as to which no specific purpose is directed, in which case, I am no more at liberty to give it to the second objects of her bounty than I should be if it were a separate fund, given by her for general charitable purposes, without describing what they were to be.

Accordingly, in this view of the case, being of opinion that it ought not to go to the almswomen, I am of opinion that the rule laid down by Lord *Cottenham* (*a*) applies in the present case, and that the best thing that can

(*a*) *See The Attorney-General v. The Ironmongers' Company*, *Craig & Ph.* 208; 10 *Cl. & Fin.* 915, *reversing* 2 *Beav.* 313.

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can be done with this charity is to apply it for the purposes of a school. I am of opinion that it must be a Church of *England* school, but a school admitting the children of Dissenters on the terms upon which the Court usually admits them. Admitting, to the fullest extent, that the testatrix's opinions were those of the Church of *England*, the effect of her will is to give no directions at all respecting this fund, which is to be applied simply to charity.

Accordingly, I am of opinion that the proper course to take is, to apply it towards a school; but I do not think I am at liberty to found one at *Luton;* it must be founded at *Dunstable*, where the charity itself was originally founded.

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WILSON *v.* KEATING.

May 11, 12.

A. transferred shares to *B.* by a deed executed by both parties, which admitted the payment of the consideration money. The money not having really been paid, *A.* filed a bill against *B.* to compel payment. *B.* stated that a third person (*C.*) had told him that he had purchased the shares and put them into *B.'s* name as a trustee, and that *B.* would incur no responsibility, as the shares had been paid for; that he *C.* produced the deed in question, which he, *B.* signed, on the faith of the recital contained in it, that the purchase-money had been paid. *Held*, that this was no defence to the Plaintiff's demand, and that *B.* was bound to pay the purchase-money.

THIS suit, instituted by *Robert Wilson* against *Robert Keating*, prayed the specific performance of an agreement to purchase from the Plaintiff 105 shares in a joint-stock company called "*The Newcastle Commercial Banking Company*," and that the Defendant might be ordered to pay the Plaintiff the purchase-money.

It appeared that *John Sadleir* (deceased) had projected a scheme for buying up joint-stock banks and uniting them into one great establishment. In pursuance of this scheme, by an agreement dated the 6th of *October*, 1855, and made between *William Walker* (the managing director of the *Newcastle Commercial Banking Company*) of the one part, and *James Sadleir* (the brother of *John*) and Mr. *Law* and Mr. *Kennedy* of the other part, *Walker* undertook, within seven days from the 26th day of *October* instant, to procure to be transferred to the parties of the second part or such other persons as they should nominate not less than 4,000 shares in the *Newcastle Commercial Banking Company* at 5*l.* per share. And that the present directors of the company would do all acts requisite or proper for transferring to the parties of the second part the effective management, direction and control of the company, and would, either by disqualification or by resignation, vacate their offices, in order to the election of the parties of the second part, or their nominees, as directors in their stead. The parties of the second part undertook with *Walker* that they would, by themselves or

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or their nominees, accept transfers of so many shares as should, within six months, be offered to them by *Walker* or any other registered shareholders, and pay 5*l.* per share for them.

By another agreement between the same parties, the shares taken were to be deposited with *Walker* until the purchase-money for them had been paid.

The bill alleged that the Defendant had agreed to purchase 105 shares from the Plaintiff for 525*l.* As to this, it appeared, that by a deed of transfer dated the 20th day of *November*, 1855, expressed to be made between the Plaintiff of the first part, the Defendant of the second part, and the company of the third part, and duly signed and executed by the Plaintiff and Defendant, after reciting that the Plaintiff being possessed of 105 shares had contracted and agreed with the Defendant for the sale of them to him at the price of 525*l.*, it was witnessed, that in consideration of 525*l.* therein stated to have been paid to the Plaintiff by the Defendant, at or before the execution thereof, the receipt of which said sum of 525*l.* the Plaintiff was thereby stated to acknowledge, and from the same to release and discharge the Defendant, the Plaintiff did thereby transfer unto the Defendant 105 shares, together with all dividends then due and to become due thereon, subject nevertheless to the covenants contained in the deed of settlement of the company.

The consideration was not in fact paid, and the Defendant, after the death of *John Sadleir*, by suicide, in *February*, 1856, and after the *Newcastle Banking Company* had stopped payment in *August* following, refused to pay it. Upon this, the Plaintiff brought an action at law to recover the amount, but he found that he

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he had no remedy at law, being estopped by the statements and the release contained in the deed executed by him. The Plaintiff then filed this bill, praying, in effect, for payment of the purchase-money.

The Defendant contended that he was a mere trustee, but the bill alleged that he had acted as owner, that these shares had formed his qualification as director, and that he had received 12*l.* 12*s.* 6*d.* for dividends. The Court, however, passing by these matters, relied solely on the statement made by the Defendant himself in his answer, which was as follows:—

"Some time in the month of *November*, 1855, but when precisely I cannot recollect, *John Sadleir* told me that he had made arrangements for purchasing the *Newcastle Banking Company*, and that he had put some of the shares in my name. I told him that I could not take them, as I had no money to pay for them; upon which he replied, that that was not what he meant, but I was to act as trustee for him, and that I should incur no responsibility in so doing, as the shares were already paid for, and he produced to me one or two deeds of transfer, I forget which, and shewed me the recital therein that the purchase-money for the shares had been paid, which I read, and he asked me to sign the said deeds or deed, which I did, on the faith of the recital that the shares were paid for; but when I signed the said deed or deeds I had no idea of taking any beneficial interest under the deed or deeds, and I have never claimed any such beneficial interest, and I considered that the shares transferred to me were to be held by me merely as trustee for *John Sadleir*, and that I should incur no responsibility in respect of them. I believe that the deeds or one deed of transfer which were executed by me as aforesaid was the

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the deed of transfer set forth in the sixth paragraph of the Plaintiff's bill. *John Sadleir*, at the same time I executed the said deeds or deed, also informed me that I had been appointed a director of the company, and that he wished me to accept the office. Immediately after I had signed the said deed or deeds *John Sadleir* took it or them away with him, and I have never seen it or them since. I was first-cousin to *John Sadleir* and was intimately acquainted with him, and had a great personal regard for him and the fullest reliance in his word and in his integrity, and I was not undeceived in my opinion of him until after his death, which occurred on the 17th of *February*, 1856, by his own hand, under circumstances which have become notorious, and which it is therefore unnecessary to repeat." He said afterwards:—"The *Newcastle Banking Company* stopped payment on the 26th of *August*, 1856. Except as regards the fact of my having signed the deeds or deed of transfer, and the circumstances under which I signed them, and the representations made to me by the said *John Sadleir* as aforesaid, I was wholly ignorant of all the facts and circumstances hereinbefore stated until some time after the death of *John Sadleir*, and some of the said facts and circumstances I have only discovered since the filing of the Plaintiff's bill, and the first time that I heard of there being any agreement for the purchase of shares in the *Newcastle Bank* between *John Sadleir*, *F. I. Law* and *R. H. Kennedy*, was some time after the death of *John Sadleir*, when Mr. *O'Shea*, the manager of the *Newcastle Banking Company*, told me that they were to give 5*l.* a share for them, and that they were to be allowed a year to pay for them. I never gave any authority, directly or indirectly, to *John Sadleir*, *James Sadleir*, *F. I. Law* and the said *R. H. Kennedy*, or any or either of them, to purchase or negotiate on my behalf for the purchase of any

any shares in the said *Newcastle Company* with any shareholder in the said company."

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Mr. *R. Palmer* and Mr. *A. G. Marten*, for the Plaintiff.

Mr. *Selwyn* and Mr. *H. Stevens*, for the Defendant.

The MASTER *of the* ROLLS.

By a deed made between the Plaintiff of the first part and the Defendant of the second part, the Plaintiff, in consideration of 5*l.* per share, conveyed 105 shares in a joint stock company to the Defendant. Both parties executed that deed, but the purchase money being unpaid, the Plaintiff, by this bill, asks that the Defendant may be ordered to pay it. If it stood there, the relief asked would be a mere matter of course. It is true that the deed recites that the purchase-money had been paid, and the Plaintiff admits that fact by his signature, but that is a matter which, in this Court, can always be contested and disproved by evidence, and here not only is it proved but it is admitted that the Plaintiff has never been paid.

In that state of things, what is the answer to the Plaintiff's demand? It is said that no contract between the Plaintiff and Defendant has been proved, but in my opinion that rests upon a fallacy. As I suggested in the course of the argument, the contract is not necessarily a matter distinct from the conveyance. There may be a prior contract, distinct from the deed, which is carried into effect by and merged in the subsequent deed, but that is not necessarily so. Thus, where *A.* conveys property to *B.*, in consideration of a sum of money, the deed usually recites a contract between the parties, but there

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there may be no pre-existing contract or arrangement upon the subject, and then the deed itself constitutes both the contract and the conveyance to the purchaser, and vests the right of the property in the grantee and the right to receive the purchase-money in the grantor; and if the purchase-money be not paid, the vendor is entitled to come here and obtain a decree for its payment.

In point of fact, in all sales of stock and shares through brokers, there is no previous contract between the parties, the whole matter is settled through the instrumentality of third persons, and the parties never see or know anything about each other. But the objection which is raised here is not confined to the sale of stocks or shares, it would equally apply to the sale of land.

If a person conveyed a farm to another, nominally in consideration of 1,000*l.*, but the Plaintiff, not having received the purchase-money, had come and asked for payment of it by the Defendant, it might just as well be said, "you have proved no contract whatever between the parties." I say this Court could not listen to any such objection:—it is quite untenable. It is true the deed does estop the parties at law, because at law you cannot contradict the deed, but it is settled by abundance of authority, that in this Court you can contradict the statement of the payment of the purchase-money; nay more, though there is a receipt for the purchase-money endorsed and duly signed by the vendor, yet, even then, the vendor would have a lien on the estate for the unpaid purchase-money, and which would also be a debt due from the purchaser to the vendor. It would not lie in the mouth of the purchaser to say, "you may take back your land if you please," for the seller would be entitled to say, "you have bought this land from me; you

you have executed this deed; you have got the land, and I insist upon your paying me the purchase-money." In my opinion, this Court would enforce payment, and hold that the objection could not be supported.

Another argument is, that Mr. *Walker* was not the agent of the Defendant. I think that is so, and that he was the agent of the Plaintiff, but as the purchaser himself actually executed the deed, it is wholly immaterial whether he had any agent in the matter or not. If the deed had been executed by a person on behalf of the Defendant, or if there had been an agreement signed by some person as his agent, then it would have been material to prove the agency; but when a person executes a deed which conveys the property to him, and accepts that conveyance by the execution of that deed, it is wholly immaterial whether he employs an agent or not in the matter. I am assuming throughout that there exists nothing to entitle the Defendant to set aside the transaction on the ground of misrepresentation, fraud or mistake; if there be it would be necessary for the Defendant to take some proceeding himself to set it aside.

In that state of the case, and the purchase-money remaining unpaid, it is properly said, that the burthen of proof lies upon the Defendant to shew sufficient grounds for not having performed that which he has undertaken by the deed. I cannot put the case more favorably for the Defendant than by taking his own statement, but in my opinion it constitutes no answer to the relief to which, in my opinion, the Plaintiff is entitled.

What the Defendant himself says in his answer is this:—He says, "Some time in the month of *November*, 1855," &c.—[*See this passage stated antè, page* 123].

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The question is, whether this conversation with Mr. *John Sadleir* can exonerate the Defendant from the contract contained in this deed which he executed to purchase those shares from the Plaintiff. This, at all events, is certain, that *John Sadleir* was not the agent of the Plaintiff, who knew nothing at all about him; no false representation was ever made to the Defendant by the Plaintiff or by any agent of the Plaintiff; all that the Plaintiff did was to execute a deed and to deliver it to his agent, to be delivered to the Defendant, to be executed by him, the deed being duly drawn as made between those two parties. I have not the slightest doubt of the accuracy of the Defendant's statement, that *John Sadleir* told him, "you are not to pay for these shares, I have already paid for them; you are to hold them really for me." But it is equally clear that the Defendant was bound himself to see that the shares had been paid for. He executed the deed, and he was bound to know, that he was liable to pay for the shares if they had not already been paid for, and that by executing that deed he became liable for that payment to the Plaintiff; and unless he had an acknowledgment from the Plaintiff, or from some agent of the Plaintiff, that he had received the purchase-money, the statement by any other person that he had paid it could not exonerate the Defendant from his liability to pay the Plaintiff.

It is said, in argument, that the question is, which of two innocent parties is to bear the loss occasioned by the fraud of a third. I think that this is not an unfair way of looking at the case. Here the fraud was committed by *John Sadleir*, who said to his cousin, "execute this deed; you will only hold the property in trust for me; I have paid the purchase-money." That was a fraud committed by *John Sadleir* upon the Defendant alone, and *John Sadleir* is the only person who is liable to

to the Defendant in respect of it; it is a question solely between *John Sadleir* and the Defendant. By reason of representations made by *John Sadleir* to the Defendant, which were false, the Defendant enters into an engagement with the Plaintiff, by which he undertook to purchase 105 shares in a joint stock company from the Plaintiff and to pay him 525*l.* for them. Then how is the Plaintiff to blame for that? It is clear that as between two innocent parties, the person who was deceived by the false representations and was induced thereby to enter into an engagement with a third, is the person who must bear the loss, which results from his liability to perform that engagement.

I therefore think it clear, that this transaction with *John Sadleir*, as stated in the answer, in no respect exonerates the Defendant from the consequences of the liability he has incurred to the Plaintiff by executing that deed.

I disregard altogether the statement respecting the previous arrangement, by which three persons, who it is alleged were the mere puppets of *John Sadleir*, contracted with Mr. *Walker*, on behalf of the shareholders, to purchase 4,000 shares in the bank: that is a matter which does not affect the Plaintiff in the slightest degree, or render it necessary for him to sell his shares for nothing, or to transfer them to any other person without being paid for them. The matter, in my opinion, rests upon a deed, which it is not pretended was obtained by any fraud or any improper statement of the Plaintiff, or of any person through whom the Plaintiff could be bound. The Defendant is therefore bound to perform the obligations contained in the deed, one of which is to pay the purchase-money, which has not been paid,

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and in my opinion the Plaintiff is entitled to a decree.

I have in this case omitted all consideration arising from the circumstance of the Defendant's acting as director during the whole of that time; but if any observation arises upon that, it is clear it makes the case rather more unfavorable to him than it would be without it.

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June 10.

When a fund is set apart to answer an annuity, the Statute of Limitations cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee, whose legacy was payable on the testator's death.

THE testator bequeathed to his brother *Josias Bright* (the Plaintiff) the sum of 100*l.*, to be paid to him as soon as conveniently might be after his (the testator's) decease, and to his brother *John Bright* (since deceased) the sum of 150*l.*, to be paid to him within twelve calendar months after his (the testator's) decease. And he bequeathed the sum of 150*l.* to such person or persons as *Harriett Offord Hinson* should by her will appoint, and to be paid within three calendar months after her decease. He also bequeathed to *Harriett Offord Hinson*, in case she should so long remain single, an annuity or clear yearly rent-charge of 50*l.*, to be issuing out of all his freeholds and copyholds, until one of the children of either of his brothers *Josias Bright* and *John Bright* should attain the age of twenty-one years. And he declared, that so soon as any child of either of his said brothers should attain twenty-one years, all his real estate should be exonerated from the annuity to *Harriett Offord Hinson*, it being his will that from that time the annuity should be payable out of his personal estate only, as thereinafter mentioned.

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The testator then devised to three trustees and their heirs all his real estates, charged with the annuity of 50*l.* to *Harriett Offord Hinson* during her life or until her marriage as before mentioned, or until one of the children of either of his said brothers should attain the said age of twenty-one years, upon trust, as soon as any one of the children of either of his said brothers should attain twenty-one years, absolutely to sell the real estates and to stand possessed of the produce upon the trusts thereinafter declared. He then bequeathed unto the same trustees all his personal estate upon the trusts thereinafter mentioned.

And the testator declared, that the trustees should stand possessed of his personal estate, upon trust to pay his debts, legacies, funeral expenses, &c., and invest the surplus, together with the rents of his real estate from the time of his decease until the sale thereof, and also all the moneys to arise by the sale of his real estate, in the funds or at interest upon government or real securities, and should stand possessed thereof upon trust to continue invested so much of the said trust moneys as they might think adequate and sufficient to answer the payment of the annuity of 50*l.* to *Harriett Offord Hinson*, and should thereout pay the same to her accordingly, and from and immediately after her decease or marriage should stand and be possessed of and interested in the moneys, stocks, funds and securities, so continued to be invested for payment of the said annuity, upon trust to pay and apply the same in such and the same manner as he had directed the residue of his personal estate to be paid and applied. And as to all the rest, residue and remainder of the said trust moneys, upon trust to pay and divide the same unto and equally amongst all and every the child and children of his two brothers *Josias Bright* and

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John Bright that should be born at the time any one of such children should attain the said age of twenty-one years.

The testator died in 1822.

A child of one of the two brothers attained twenty-one in 1839, and thereupon the trustees sold the real estate and invested the produce in 1,472*l.* Three per Cents. Reduced. There were two children of *Joseph*; they both attained twenty-one, the share of one was vested in the Defendant *Steele* and of the other in the Defendant *Hopewell.*

Harriett Offord Hinson died in *October*, 1856, having received the dividends of the fund during her life in respect of her annuity, and on her death the fund became distributable.

By the decree in a suit of *Bright* v. *Larcher*, made in *May*, 1858, the Master of the Rolls declared that the legacies of 150*l.*, 150*l.* and 100*l.* were not charged on the real estate, and he ordered the 1,472*l.* stock to be divided between *Steele* and *Hopewell.*

The Lords Justices, on the appeal of the executor of *Harriett Offord Hinson*, varied the decree, by declaring the legacy of 150*l.* payable out of the 1,472*l.*, but no declaration was made as to the other two legacies.

The testator's brother *Josias Bright*, who had not been made a party to *Bright* v. *Larcher*, filed this bill against the surviving trustee and against *Steele* and *Hopewell* alone, without making the personal representatives of the testator a party, praying a declaration that

that his legacy of 100*l.* was payable "out of the proceeds of the testator's residuary real and personal estate, and that the same might be paid out of the 1,472*l.* stock."

The bill alleged that the personal estate had been applied in payment of debts, &c., and had been thereby completely exhausted, but this was not proved.

Mr. *Selwyn* and Mr. *Humphrey*, for the Plaintiff, argued, first, that the Plaintiff's legacy was charged on the real estate in the same way as the legacy of 150*l.*, and that this must be considered as having been determined by the Lords Justices; secondly, that the Statute of Limitations was inapplicable, for not only was the fund in question held upon an express trust, but because the fund provided for the payment of the annuity was, as regarded legatees and executors, a reversionary interest which the Plaintiff had no present right to affect, or to give a discharge for, until the death of the annuitant; that all parties interested in this fund had waited until it became divisible, and that the Statute of Limitations could not be set up by any of such persons against the rest; lastly, as to the residuary legatees, that they were entitled to nothing until all the charges upon the fund had been paid, for until that had been done, it did not constitute residue.

Mr. *Toller* for *Larcher*, the trustee.

Mr. *G. L. Russell* and Mr. *Nalder*, for *Steele*, and

Mr. *R. Palmer* and Mr. *Bagshawe*, jun., for *Hopewell*, argued, first, that the suit was defective for want of parties, no legal personal representative of the testator having

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having been made Defendant; secondly, that there was no charge of the Plaintiff's legacy on the real estate, or on the produce of the sale of it; thirdly, that the claim was barred by the Statute of Limitations and by the laches of the Plaintiff, whose legacy was payable in 1823 or twelve months after the testator's decease.

Wheeler v. *Howell* (*a*); *Burrell* v. *Lord Egremont* (*b*); *Snow* v. *Booth* (*c*); *Farran* v. *Beresford* (*d*); *Cox* v. *Dolman* (*e*); *Young* v. *Lord Waterpark* (*f*); 3 & 4 *Will.* 4, *c.* 27, *s.* 40, were cited.

Mr. *Selwyn* in reply.

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June 10. I am of opinion that the statute bars the right of the Plaintiff in this case.

In the first place, I consider that the statute bars the right of the Plaintiff, unless there is either an expressed or implied trust in his favor. The argument in the Plaintiff's favor is, that there is a trust of this fund, because there is a trust of the residue, and if the statute bars the right of the pecuniary legatee, it also bars the right of the residuary legatees as well; that if there be a trust for the one there must also be a trust for the other. In addition to this, it is argued, that the residuary legatee has no right to any part of the fund, until it has paid everything that is payable out of it: and

(*a*) 3 *Kay & J.* 198.
(*b*) 7 *Beav.* 205.
(*c*) 2 *Kay & J.* 132.
(*d*) 10 *Clark & Fin.* 319.
(*e*) 2 *De Gex, M. & G.* 592.
(*f*) 1 *Mac. & G.* 640; 13 *Simons*, 199.

and that, until this is done, it cannot properly be called "residue." In my opinion that argument does not apply: in every case where a fund is set apart to answer an annuity, there is a trust of the fund set apart in favor of the residuary legatee, however long the annuity payable out of it may have lasted: if a sum of 1,000*l.* consols was set apart to answer an annuity of 30*l.* a year, and the annuitant lived thirty or forty years, there can be no question but that the 1,000*l.* would, on the death of the annuitant, belong to the residuary legatee, it having been set apart for that particular purpose. But in my opinion a legatee who was to be paid a sum of 100*l.*, at once, could not come at the death of that annuitant and say, "this fund is applicable to the payment of my legacy," and that "if it is a trust for the residuary legatee, it is also a trust for me the pecuniary legatee." Suppose (what is not exactly this case, but will tend in a great measure to illustrate the view which I take of it, because it cannot be put higher) that this fund, set apart to answer the annuity, had been given upon trust after the death of the annuitants to fall into and form part of the testator's general personal estate, would that be a trust for creditors? I think it obvious that a creditor would, in that case, be barred by the Statute of Limitations; if not it has no meaning, for in this case the testator died in 1822, and any creditor might immediately have sued and enforced his claim.

It is said that there is this distinction between a creditor and a legatee, viz. that a creditor might have gone against this particular fund at any time, but that a legatee could not have come upon it until after the death of the annuitant, and that therefore, as there was no other fund for the payment of the Plaintiff's legacy, this

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this trust fund first became applicable to that purpose at that period. I mean to express no opinion whether the statute would apply to such a case, or whether, in the absence of a decree in this Court or a judgment at common law against the assets *quando acciderint*, the statute would apply and prevent a legatee from obtaining payment out of assets which did not accrue until upwards of twenty years after the testator's death; but assuming the law on this point to be in favor of the Plaintiff, I am still of opinion that the burthen of proof lies upon him to establish that there was no fund to pay his legacy previously to that period; and, assuming that there was a trust, upon the death of the annuitant, for payment of such debts and legacies as were then payable and, subject thereto, for the residuary legatee (which is putting it in as favorable a manner as it can be put), that it would not let in debts which were already barred by the statute or let in legacies, unless it could be established by the legatee that there was no other fund applicable for their payment. It cannot, I think, be put higher than that it is a trust for payment of such legacies as the general personal estate has not already been sufficient to pay: if so, it would make it incumbent upon the legatee to prove that fact before he could contend, with success, that this fund was held in trust for him, and only subject thereto in trust for the residuary legatee.

I do not think this is a case in which it would be necessary to have the legal personal representative here, although it would be, if it were necessary to make a decree for the administration of the personal estate. But regarding this in the most favorable light in which it can be regarded for the Plaintiff, and as the Lords Justices appear to have regarded it, viz. that upon the death

death of the annuitant, this fund formed part of the general personal estate, and applicable to the payment of all such legacies as the personal estate already has not paid or which were not barred by time, and subject thereto for the residuary legatee, then it would let in the legacy of 150*l.* ordered by the Lords Justices to be paid, because the right to receive it did not accrue until after the death of *Harriett Offord Hinson*, but not legacies which were payable twenty years before that period, and consequently not the other two legacies, one of which was payable three months after the death of the testator, and the other at the end of twelve months; the words being, "as soon as convenient," which would not postpone it after that period.

I am of opinion, therefore, that in this case there is no trust in favor of the Plaintiff, and not being a trust in favor of the Plaintiff that the statute applies. His case fails, and the bill must be dismissed with costs.

NOTE.—Affirmed by the Lords Justices, 26th *July*, 1859.

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THOMAS *v.* RAWLINGS.

June 2.

A solicitor declined answering some interrogatories, on the ground that he had obtained all his information "whilst acting as the solicitor" of his co-Defendant. *Held*, that he had not brought himself within the rule as to professional privilege.

A solicitor said he had obtained his information "either as a creditor or as the solicitor" of his client. *Held*, that this statement must be taken most strongly against the solicitor, and that he was bound to give the discovery.

THIS suit was instituted by *Thomas* against *Rawlings* and his solicitor *Stubbs*. The Plaintiff claimed to be entitled to a mortgage on a lease granted to the Defendant *Rawlings*, and dated the 23rd day of *June*, 1854. His claim was founded on an equitable agreement executed by *Rawlings* in *April*, 1853, prior to the lease, and an award upon a reference to arbitration in 1858, which had been made in an action brought by the Plaintiff against *Rawlings*.

The lease was in the possession of the Defendant *Stubbs*, the solicitor of *Rawlings*, who claimed a lien on it for money lent and costs.

The bill prayed a declaration, that *Rawlings* was a trustee of the lease for the Plaintiff, and that *Stubbs* had no lien on it, and that if he had, as against the Plaintiff, then that an account might be taken, and that on payment of what might be found due to *Stubbs*, he might be ordered to deliver up the lease to the Plaintiff.

Interrogatories being exhibited for the examination of *Stubbs*, he in his answer stated, that the lease had been deposited with him in *June*, 1854, for the purpose of securing the money due to him from *Rawlings*, and that at the time of the deposit, he had no notion that the Plaintiff had any claim thereon or thereto. He said that *Rawlings* was still in his debt, and that he claimed and had a lien on the lease for valuable consideration, and that he obtained it without any notice of the Plaintiff's claim.

He

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He declined answering the principal part of the interrogatories, on the ground (as to some), that he had obtained the information respecting them "whilst acting as the solicitor of the Defendant *Rawlings*," or "whilst acting professionally for" him. He insisted he was not bound to give the discovery required by the interrogatories, on the ground that he had derived all the information which he possessed on the subject "either as a creditor of the Defendant *Rawlings* or as his solicitor."

He said as follows:—"And I submit and humbly insist, that I am not bound to make any answer to such of the interrogatories as will lead to a disclosure of my claim against the Defendant *Rawlings*, or of the matters which came to my knowledge whilst I acted as the professional adviser of the said Defendant. And I claim the benefit of this defence to so much of the said bill as I have not hereby fully answered, to the same extent as if I had pleaded the same."

The Plaintiff took exceptions which now came on for argument.

Mr. *R. Palmer* and Mr. *C. Swanston, junior*, for the Plaintiff.

The MASTER *of the* ROLLS called on the Defendants.

Mr. *Selwyn* and Mr. *Cottrell:* First, the Defendant is a purchaser for valuable consideration without notice, and he is not bound to answer as to his own title. Secondly, the Defendant has obtained his information in his character of solicitor, and he is therefore bound not to divulge it. The mere fact of making a solicitor a Defendant does not entitle a Plaintiff to a discovery as to matters of professional confidence. A plea is not necessary

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cessary in such a case, the objection may be taken by the answer, for the privilege is that of the client. They cited *Herring* v. *Clobery* (*a*); *Jones* v. *Pugh* (*b*); *Carpmael* v. *Powis* (*c*); *Jerrard* v. *Saunders* (*d*); *Ovey* v. *Leighton* (*e*); *Portarlington* v. *Soulby* (*f*); *Swinborne* v. *Nelson* (*g*); *Crisp* v. *Platel* (*h*); *Browne* v. *Lockhart* (*i*); *Calley* v. *Richards* (*k*), and *Sugden's Vendors* (*l*).

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I will not trouble the Plaintiff to reply, because admitting the proposition of the Defendant as to professional confidence, still the case does not here arise. The rule undoubtedly is, that communications between solicitor and client are privileged, and that the privilege is that of the client; but it is confined to communications made to the solicitor by the client dealing with him in that character; in *Lord Walsingham* v. *Goodricke* (*m*), Vice-Chancellor *Wigram* very carefully considered the question. But is this the case of communications between the client and his solicitor? There is no such statement or allegation of the Defendant in his answer. All he says is, he got the knowledge "whilst acting as the solicitor of *Rawlings*." If this objection prevailed, a solicitor who had many clients might decline answering anything by saying he obtained the knowledge when acting professionally for his different clients. A Defendant is not bound to discover communications relating to the cause which have passed between him and his solicitor for this reason:—that if he were,

(*a*) 1 *Phill.* 91.
(*b*) 1 *Phill.* 96.
(*c*) 1 *Phill.* 687; 9 *Beav.* 16.
(*d*) 2 *Ves. jun.* 454.
(*e*) 2 *Sim. & St.* 234.
(*f*) 6 *Sim.* 356; 7 *Sim.* 28.
(*g*) 16 *Beav.* 416.
(*h*) 8 *Beav.* 62.
(*i*) 10 *Sim.* 420.
(*k*) 19 *Beav.* 401.
(*l*) *Page* 1019 (11*th ed.*)
(*m*) 3 *Hare*, 122.

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were, he would be unable to communicate to his solicitor the facts necessary in order to enable him to conduct the cause. It is not necessary here to go into the question of whether this privilege is confined to communications *post litem motam* or not. Here the solicitor has obtained a knowledge whilst acting as a solicitor, but he does not allege that it consists of communications on professional matters between him and his client. It is clear, therefore, that all the exceptions depending on that point must be allowed.

With regard to the other discovery, he says, he derived his information "either as a creditor of *Rawlings* or as his solicitor." This statement, in the alternative, must be taken most strongly against the Defendant, and it must be assumed that he obtained the information as creditor; he is, therefore, bound to set it forth.

All the exceptions must be allowed.

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FRY *v.* FRY.

June 13.

A testator died in 1834, having directed his executors and trustees, "so soon as convenient after his decease, to sell" his freehold inn. They attempted to sell in 1836, and were offered 900*l.*, which they refused. The property became greatly depreciated by a railway opened in 1843, and it still remained unsold in 1859. *Held*, that the trustees were liable for the difference between 900*l.* and the produce of a present sale.

THE testator died on the 27th of *March*, 1834. By his will, made the day before, he devised and bequeathed unto *John Fry* and *Isaac Cooper*, and their heirs, &c., all the residue of his real and personal estate, upon trust to pay to his wife the rents of all his houses (except the *Langford Inn*) during her widowhood, and afterwards on trusts for his children and grandchildren.

"And as for and concerning all that messuage or dwelling house called *Langford Inn*, at *Langford* aforesaid, with the garden," &c., &c., "upon trust, *as soon as convenient after his decease*, to sell and dispose of the same, either by auction or private sale, and for the most money that could be reasonably obtained for the same."

He directed the trustees to convert his personal estate into money, and "to place out on good security at interest" the produce and all other moneys that should come to their hands by the ways and means aforesaid, and pay the interest to his wife during her widowhood, and afterwards to pay the capital to his four children.

The testator died in 1834, his widow died in 1842. The trustee *Isaac Cooper* died in 1842, and *John Fry* the other trustee in 1856.

The *Langford Inn* still remained unsold, and greatly depreciated in value, and it was sought to charge the estates of the two trustees with the loss that had occurred by their neglect to sell it.

At

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At the hearing, the Court directed an inquiry, under what circumstances the testator's freehold messuage, called *Langford Inn*, had remained unsold.

The Chief Clerk, by his certificate, found as follows:—

"The messuage and hereditaments called *Langford Inn* were situate on the high road from *Bristol* to *Exeter*, and at the testator's death were subject to a mortgage debt for 1,000*l.* and interest. They let at a yearly rent of 80*l.* In *April*, 1836, the executors caused them to be advertized for sale in several of the local papers, and offered to sell for 1,000*l.* The sum of 900*l.* was offered by one *Bradford* for the property in 1837, and was refused by the executors. The *Bristol* and *Exeter* Railway was opened in 1843, and caused a great diminution of the traffic on which the said inn principally depended for support, and although it was again advertized for sale in *June*, 1845, no offer was then made for it, and it has since continued to be unsaleable, except at a low price, the present rent being only 30*l.*"

The cause now came on for further consideration.

Mr. *Lloyd* and Mr. *M. A. Shee*, for the representatives of *John Fry*, and Mr. *B. L. Chapman*, for the representatives of *Isaac Cooper*, argued, that the executors were not liable for any diminution in value of the property; that they had acted *bonâ fide* and for the best, and had exercised a sound discretion; that the depreciation in the value had been caused by local circumstances over which they had no control, which had rendered the property unsaleable except at so low a

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price as to render it more prudent to keep it. They cited *Buxton* v. *Buxton* (*a*); *Taylor* v. *Tabrum* (*b*).

Mr. *Freeling* for the parties beneficially interested. *Devagnes* v. *Robinson* (*c*).

The MASTER *of the* ROLLS held that the executors were liable, in consequence of their negligence for so many years in not selling the property. He directed the *Langford Inn* to be sold, and he declared that the estates of the two trustees were liable to make good the deficiency between the amount which should be produced by the sale of the inn and the sum of 900*l.*, in case the purchase-money thereof should not amount to that sum (*d*).

The testator, as lessee, was bound to insure. The insurance expired on the 25th of *March*, and the testator died on the 27th, without having paid the premium. The premium was not paid by the executors, and the house was burnt down on the 26th of *May*. *Held*, that the executors were not personally liable for not having kept up the insurance.

Another question occurred under the following circumstances, which were stated in the certificate:—

"The testator held the house in which he resided at *Langford* under lease from *Abraham Nash*. The lease contained a covenant on the testator's part to insure the premises in 300*l.* The testator had effected and kept up a policy for that amount, in accordance with the covenants; the premium on such policy became due on the 25th day of *March*, 1834. The testator died on the 27th of the same month of *March*, without having paid the premium, which was not subsequently paid by any other person on account of his estate, and the

(*a*) 1 *Myl. & Cr.* 80.
(*b*) 6 *Sim.* 281.
(*c*) 24 *Beav.* 86.
(*d*) *Reg. Lib.* 1858, *A.*, *fol.* 2560.

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the policy consequently lapsed. *Susanna Fry*, the testator's widow, continued in the occupation of the premises, which were destroyed by fire on the 26th of *May*, 1834. The sum of 300*l.* was paid to *Abraham Nash* in discharge of testator's said covenant; 150*l.*, part thereof, was contributed by the said insurance office, notwithstanding the lapse of the policy; 20*l.*, other part thereof, was paid by the said *Susanna Fry*, and the balance of 130*l.* was paid by the executors, out of the sum of 500*l.* raised by them on mortgage of the testator's real estates. The testator's will was not proved by the executors until the 17th of *June*, 1834."

There was evidence that *John Fry* had acted from the testator's death.

It was sought to charge the executors with the consequences of not keeping up the insurance.

Mr. *Lloyd* and Mr. *M. A. Shee* for the executors.

Mr. *Freeling, contrà* :—*Garner* v. *Moore* (*a*).

The MASTER *of the* ROLLS was of opinion that the executors and trustees had incurred no personal liability in respect of the breach of covenant to insure, and that they were entitled to be allowed, in account, the sum of 130*l.* paid by them in satisfaction of the testator's covenant to insure.

(*a*) 3 *Drew.* 277.

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Nov. 20, 23, 25, 26.
Dec. 6.
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Jan. 12.

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Heir at law refused a second issue to try the validity of a will by which he was disinherited.

The rules respecting new trials are less stringent in equity than they are at law, and the practice here has always been, not to consider merely whether there was evidence which would support the finding of the jury, and in that case to refuse a new trial, but the course in courts of equity has been, to consider whether, having regard to the entire subject matter and to the whole of the evidence given at or before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end, and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modification as it may consider desirable for the fair, thorough and impartial sifting of the whole matter.

Heir at law ordered to pay the costs of an issue to try the validity of the will, in which he had failed.

THIS was a motion for a new trial of an issue directed to ascertain the validity of the will of the testator under the following circumstances:—

The testator, *Samuel Swinfen*, had only one child, namely, *Henry John Swinfen*. In 1830 the father and son had joined in barring the entail of the *Swinfen estate*, and in resettling it on *Samuel Swinfen* for life, with remainder to *Henry John Swinfen* for life, with ultimate remainder to the survivor of them in fee.

In 1831, the son, *Henry John Swinfen*, married the Defendant, *Patience Swinfen*, a person much beneath him in point of rank, and he thereby gave great offence to his parents, but they became ultimately reconciled. In 1848, the wife of *Samuel Swinfen* died, and his son, accompanied by his wife, then went and resided at *Swinfen Hall* with his father, who was then very advanced in years, had great peculiarities, and was, to a certain extent, prevented, from age and infirmity, from attending

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DATES.

1854, *June* 15th. Son died.
18th, 20th. Letters.
26th. *Simpson's* instructions to town agent.
1854, *July* 2nd. Testator examined by Drs. *Rowley* & *Evans*.
5th, 6th. Instructions for will.
7th. Will executed.
26th. Death.

attending to the management of his estate and affairs as heretofore.

In 1852, *Samuel Swinfen* made his will, whereby he gave his whole real and personal estate to his son. His son had previously, by his will, given the whole of his real and personal estate to the Defendant *Patience*, his wife.

This state of things continued until the 15th of *June*, 1854, when the son died suddenly, leaving his father, then of the age of eighty, and the Defendant, his widow. His father did not long survive him; he executed the will (which was in contest) on the 7th of *July*, 1854, whereby he devised his estate at *Swinfen*, and all his furniture and moveable goods there, to his son's widow absolutely.

He was seized with bronchitis on the 15th, and died on 26th of *July*, 1854.

The circumstances which took place between the death of the son on the 15th of *June*, 1854, and that of the father on the 26th of *July* following, and the circumstances under which the will was executed, and the evidence of the witnesses, were the subject of minute examination during the argument. It is impossible to state them in detail, but the result of it will be found in the judgment of the Court. It may be sufficient to say, that the testator was examined by two medical men, Dr. *Rowley* and Dr. *Evans*, on the 2nd of *July*, but they differed in opinion as to his capacity. On the same day, the testator expressed a wish to make his will and that Mr. *Simpson* (a solicitor residing at *Lichfield*, of which he was town clerk) should be sent for. He attended the testator on the 5th and 6th of *July*, and

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and took instructions for his will. He brought the will for execution on the following day (the 7th). The will was then read over and was executed by the testator and attested by Mr. *Charles Swinfen* (the testator's half-brother) by Dr. *Rowley* (his medical attendant) and by Mr. *Simpson* (his solicitor).

The Plaintiff was the heir at law of the testator, being the eldest son of a brother of the half blood of the testator. He contested the validity of the will, and an issue was directed. At the first trial, a compromise was agreed upon by counsel, which proved ineffectual, and a second issue was thereupon directed (*a*). It came on for trial on the 12th of *August*, 1858, when the jury found in favor of the will.

The capacity of the testator was supported by the evidence of the three attesting witnesses, viz. Mr. *Charles Swinfen*, Dr. *Rowley* and Mr. *Simpson*, and by the Defendant Mrs. *Patience Swinfen*, Mrs. *Taylor* (the nurse) and Mrs. *Charles Swinfen*.

The incapacity of the testator was supported by the evidence of Dr. *Evans* and many others, and by two letters, one written by Mrs. *Rowley* to Lady *Clifton* on the 18th of *June*, 1854, and the other by Mrs. *Lishman* to Mrs. *Francis Swinfen*, at the request of the Defendant, after the son's death. In the former (speaking of the testator) Mrs. *Rowley* said—"Mr. *Swinfen* is happily spared the affliction of this mournful event, being, through great loss of memory, not equal to dwell many moments upon any subject." In the latter letter Mrs. *Lishman* said—"Poor old Mr. *Swinfen* is unable to comprehend the extent of his great loss, and I cannot help thinking this is a merciful dispensation of Providence

(*a*) *See* 24 *Beav.* 549, *and* 2 *De Gex & Jones*, 381.

dence towards our dear mourner." Another fact much relied on was, that Mr. *Simpson*, on the 26th of *June*, 1854, sent instructions to his *London* agent to take steps for the purpose of obtaining the assistance of the Court of Chancery to manage the testator's property, stating him to be in a state of fatuity immediately after the son's death; but Mr. *Simpson* explained this, by saying that he had not seen the testator from *March*, 1852, until the 5th of *July*, 1854, and that he had acted from information; and being unable to procure medical certificates of the testator's incapacity, the notion of proceeding in lunacy had been abandoned.

A motion was now made on behalf of the Plaintiff for a new trial. Mr. Justice *Byles*, on forwarding his notes of the trial, expressed himself not dissatisfied with the verdict.

Mr. *Edwin James*, Mr. *Hobhouse* and Mr. *Henry James*, in support of the motion.

Mr. *Kennedy* and Mr. *Cole*, for the Defendant.

Mr. *Edwin James* in reply.

The following cases were cited:—*Ridgeway* v. *Darwin* (*a*); *Lewis* v. *Pead* (*b*); *Osmond* v. *Fitzroy* (*c*); *Giffin* v. *De Veulle* (*d*); *Maddock's Prac.* (*e*); *Pratt* v. *Barker* (*f*); *Griffiths* v. *Robins* (*g*); *Willan* v. *Willan* (*h*); *Ingram* v. *Wyatt* (*i*); *Durling* v. *Loveland* (*k*); *Barry* v. *Butlin* (*l*); *Williams* v. *Goude* (*m*); *Evans* v. *Knight*

(*a*) 8 *Ves.* 65.
(*b*) 1 *Ves. jun.* 19.
(*c*) 3 *P. Wms.* 129.
(*d*) 3 *Wood, Lect. see App. xvi.*
(*e*) *Vol.* 1, *p.* 375 (*3rd edit.*)
(*f*) 4 *Russ.* 507.
(*g*) 3 *Madd.* 191.
(*h*) 2 *Dow. P. C.* 274.
(*i*) 1 *Hagg*, 384.
(*k*) 2 *Curtis*, 225.
(*l*) 2 *Moore, P. C.* 480.
(*m*) 1 *Hagg*, 577.

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Knight (*a*); *Wilson* v. *Beddard* (*b*); *Waters* v. *Waters* (*c*); *O'Connor* v. *Cook* (*d*); *M'Gregor* v. *Topham* (*e*); *Boyse* v. *Rossborough* (*f*); *Standen* v. *Edwards* (*g*); *Tatham* v. *Wright* (*h*).

The MASTER *of the* ROLLS.

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This is a motion for the new trial of an issue directed by me, to ascertain whether *Samuel Swinfen*, who died on the 26th of *July*, 1854, had died testate or intestate, in other words, whether a document of the 7th of *July*, 1854, signed by him was a good will or not. The only question is, whether he was in such a state of mind as to have been competent to make a will. The jury have found that he was, and that the paper signed by him is a good will. The heir at law contests the propriety of this finding, and moves for a new trial, on the ground that the verdict was against the weight of evidence given on the trial.

The rules respecting new trials are less stringent in equity than they are at law, and the practice here has always been, not to consider merely whether there was evidence which would support the finding of the jury and in that case to refuse a new trial, but the course in Courts of Equity has been, to consider whether, having regard to the entire subject matter, and to the whole of the evidence given at and before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that

(*a*) 1 *Add. Exch. Rep.* 229.
(*b*) 12 *Sim.* 12.
(*c*) 2 *De G. & S.* 591.
(*d*) 8 *Ves.* 535.
(*e*) 3 *H. L. Cas.* 132; 3 *Hare*, 488.
(*f*) 6 *H. L. Cas.* 2; 3 *Irish Eq. Rep.* (*N. S.*) 489.
(*g*) 1 *Ves. jun.* 133.
(*h*) 2 *Russ. & Myl.* 31.

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that no further investigation is necessary for the purpose of attaining that end, and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modification as it may consider desirable for the fair, thorough and impartial sifting of the whole matter. Regarding the question before me in this view, and bearing in mind the comments of counsel, I have carefully read through and considered the evidence before me, and in particular as to that portion of the evidence before me which was given at the trial at law, I have examined it in conjunction with the observations contained in the very able, careful and elaborate summing up of the learned judge who tried this case.

The evidence before me consists of three distinct sets; first, that which was given in the Court of Probate, when the paper in question was propounded as the will of *Samuel Swinfen;* secondly, the evidence given in this cause; and thirdly, the evidence given at the trial of the issue. All this it has been my duty to go through, in the manner I have already stated, but I should uselessly occupy the public time were I now minutely to discuss all this evidence, to note and compare and contrast the repetitions, the resemblances and the contradictions which occur in various parts of this testimony, or to detail the various impressions produced on my mind by the perusal and consideration of the evidence of each witness. All that I have considered it necessary or proper for me to do on the present occasion is, to explain distinctly the view I have taken of this case, and the grounds for the conclusion at which I have arrived.

The Plaintiff in equity is the heir at law, and the Defendant claims to be devisee. The general outline of

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of the case is this:—An old man of eighty years of age, and of declining health, loses his only son by a sudden and unexpected attack of illness; three weeks afterwards he makes a will, giving his landed estate and mansion and all the chattels and personal property connected with it to the widow of his son, and three weeks after he has so done, he dies. The will is attested by the solicitor who was sent for to prepare it, by the medical gentleman who habitually attended the old man, and by the testator's brother. They all depose to his sanity and competency to make a will.

On the other hand, one of the attesting witnesses to the will, only ten days before, sent instructions to his agent in *London* to take steps for the purpose of obtaining the assistance of the Court of Chancery to manage his property, stating him to be in a state of fatuity immediately after the son's death. Two ladies, one of them Mrs. *Rowley* (the wife of the physician who attested the will) the other a Mrs. *Lishman*, who was intimate in the family, write letters, in which they announce the son's death to the father's relations, and in these letters state, that the old man is incompetent to understand not merely the extent, but even the nature of his loss. Dr. *Evans*, a physician of eminence, is brought from *Birmingham* to examine the state of the health of the old man four days before the document in question is signed, he repeats his visit on the following day, three days before the document purporting to be a will is signed, and on both of these occasions he pronounces the old man to be wholly incompetent to make a will. On the day on which the will is signed, the sister in law of the old man and the mother of the heir at law comes to the house to see him, and she is refused all access to him. It is obvious, that such a case requires a very careful and jealous sifting, and after this has been done,

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it may well be, that not merely a jury but any persons however much accustomed to consider and weigh and compare the effect of opposing testimony, may hesitate long before they come to a conclusion.

I shall proceed to explain a little more in detail the effect which has been produced on my mind by the perusal of the evidence and the steps by which I have arrived at the conclusion I am about to pronounce. In the first place, in all these cases, I lay out of consideration, as far as possible, the propriety of the disposition made by the testator. I am apprehensive from my experience in such cases, that it does happen, perhaps not unfrequently, where the evidence is nicely balanced, that the jury are swayed by their opinion of whether the will contained such a disposition of the testator's property as it was fit that he should make. Unfortunately, this consideration can never be wholly excluded, because in cases of unsoundness of mind, the will itself may disclose tokens of a perverted intellect, but even in these cases, the contents of a will are a very dangerous ground to rest upon, even when connected with other testimony; but in cases where there is no unsoundness of mind (in the proper sense of that term), but rather an absence of intellect; and the only question is, whether the deceased person knew what he was doing, the contents of the will can rarely be brought to throw light on that subject; and accordingly, in this case, I wholly disregard the circumstance that the document, purporting to be a will and signed by this infirm old man, simply restored his son's widow to the position in which she was before the son's death, and in which she would have been in, had the dates of the deaths of the father and son been transposed. I look exclusively at the testimony of the state of mind of the alleged testator: if he was competent to make a will, his intentions,

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tentions, however much I may disapprove of them, must be carried into effect; if he was not competent, the contents of the will, being such as he would have made if he could, and such as others might have wished him to have made, will not make it valid. If, to use an expression which has been occasionally made use of before me in this case, the will was concocted, it cannot stand, although it was concocted for a laudable purpose. In looking at this testimony also, I have kept constantly in view that the burthen of proof lies on the Defendant who sets up the will.

Bearing all these preliminary considerations in my mind in reviewing the evidence, I consider, first, how the alleged will is supported, and for this purpose I look, first, at the testimony of the witnesses who attested the will. If the case were confined to their testimony, nothing could be clearer or more convincing.

Mr. *Simpson*, a legal practitioner of long standing and great respectability in the City of *Lichfield*, swears positively to the competency of the old man to give instructions on the 6th of *July*, and to his competency to understand it on the 7th, and to the fact that he did understand it, and did sign it with a full and accurate knowledge of its contents.

Dr. *Rowley*, a medical gentleman of advanced age and high character, swears positively to the same effect.

Mr. *Charles Swinfen*, the half-brother of the old man, who, with his wife, were residing in the house, gives exactly the same evidence. There is no hesitation or doubt on this point, they all three swear positively to the same fact.

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After considering this case in every way, looking at it in every point of view, I am unable to suggest or imagine any theory which can enable any Court to get over this testimony, short of imputing wilful and corrupt perjury to these three gentlemen. It could not be mistake, it could not be negligence, they knew that Mr. *Samuel Swinfen* was very old, that he was in a state of failing health, and that his mind and memory were less vigorous than they had been; they had, one and all, abundant opportunities of knowing whether the old man was, or was not, competent to make the will, and if he was not, they must have united together to concoct a spurious document, for the purpose of transferring the *Swinfen* estates from the heir at law to the widow of the son. I look for the motives which could have induced these three gentlemen to unite in so disgraceful a combination; I find literally none; pecuniary interest not only is not alleged, but the absence of it is proved. Indeed, so far as Mr. *Charles Swinfen* is concerned, he lost thereby his share, whatever it might be, as one of the next of kin of the old man, of the personal property in and about *Swinfen Hall.*

The only possible suggestion of a motive that has occurred to me is a feeling of compassion for the widow of the son. It may possibly be suggested, that they might have thought, that the sudden decease of the son, which had produced so great a change in the prospect and condition of his widow, ought to be repaired, and that it would be but fair if they were to do for her, what the old man, if he had been competent, would, in their opinion, most assuredly have done. But even if this were so, it is wholly inadequate, as a motive, to account for such a transaction. Three respectable gentlemen do not combine together to commit what is little short of forgery, and support it by perjury, for the purpose of redressing

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redressing those calamities, which the sudden and unforeseen death of a near relative may inflict on some one of their friends or acquaintance. But it does not stop here; they could not have been the only persons engaged in this conspiracy. Mrs. *Patience Swinfen* (the Defendant), Mrs. *Charles Swinfen* (the sister-in-law), who would derive no advantage from it, and Mrs. *Tayler* (the nurse), must all have combined with the solicitor, the doctor and the brother to commit this fraud. It goes a step still beyond this, for on the assumption of such a combination, the conduct of all the persons engaged is wholly inconsistent with any idea of reason or sense. If the conduct of these three gentlemen is referrible to a plan to concoct a will for the old man and to obtain his unconscious signature to the document, it is impossible to conceive a more bungling performance, or a case in which greater care was taken to provide for their own detection, for they were active in obtaining testimony to refute their own assertions. On the assumption that a plan was formed to concoct the will for the old man, nothing could have been more simple than to have kept every one away from him but the persons engaged in the transaction and those who had been in the habit of seeing him, viz.:—Mr. *Simpson*, Mr. *Rowley*, Mrs. *Patience Swinfen*, Mr. and Mrs. *Charles Swinfen* and the nurse Mrs. *Tayler*, who waited upon him. If they had done this, the thing was accomplished beyond the possibility of discovery. The old man had not once, for eight or nine months, left his bedroom, in consequence both of the accident which occurred as he was going up stairs in *November* previously, and of his increasing bodily infirmity: it is the common case of both sides, that when he began to keep his room, he was in the full possession of his faculties: it could have created no suspicion, if no other persons had been allowed to see him, for, in the ordinary and natural course of events, he would

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would have seen no one, and no one would have come to him. But if these three gentlemen were cognizant of the infirm state of his intellect, and that in truth he was in a state of fatuity, and if they intended to make a will for him, the sending for Dr. *Evans* was an act of positive insanity. If the old man was fatuous they must have seen it, they must have known, from the high character of Dr. *Evans*, that he would be privy to no fraud, and to no irregular transaction. I consider, therefore, the sending for Dr. *Evans* to be a badge of the *bona fides* of the conduct of these persons. On this supposition also, why did Mr. *Simpson* scruple about preparing the will on the 5th of *July*, and not on the 6th? But adopting the opposite supposition and on the assumption that they really believed the testator to be competent to make a will, though of feeble and even of a decaying mind, the whole matter is clear and consistent. It is important to keep carefully in view the two modes of looking at this case, and which are, I think, the only two in which it can be regarded on behalf of the Plaintiff the heir at law; either *Samuel Swinfen* was in a state of complete fatuity, evident to every one who had fair opportunities of observing him, in which case the conduct of the three attesting witnesses is a gross fraud, or *Samuel Swinfen* was in such a state of mind, that fair, honest and reasonable persons might well hesitate about his competency, in which case the Court must consider and weigh who had the best opportunities of forming an accurate judgment on this subject. It is, no doubt, to be observed, that the sending for Dr. *Evans* to test the mental capacity of the old man is a proof that they, or that some one or more of them, had a doubt on the subject, and wished to be fortified by his opinion, but this circumstance is not, I think, a sufficient reason for rejecting their clear and distinct evidence on the competency of the old man; because, if it comes to a balance of opinion

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opinion between the three attesting witnesses and Dr. *Evans* alone, the Court must necessarily give the greater weight to the greater number, who had more frequent opportunities of seeing Mr. *Samuel Swinfen.* The case in favor of the will, as derived from the evidence as I read it, is not that the testator was not enfeebled in mind as well as in body, but the question is, whether it was to such an extent as to make him incompetent to make a will. These gentlemen swear positively, that he was competent on the 6th and 7th of *July:* is their testimony to be rejected, because Dr. *Evans* swears as positively that he was not competent on the 3rd and 4th of *July?* The conclusion I have come to is, that I fully believe the testimony of both. I believe that the old man was competent to give instructions for a will on the 6th of *July,* and on the 7th, that he did so, and that he signed the will, knowing and approving of its contents. I also believe, that this is not inconsistent with his having been incompetent to do so on the 3rd and 4th of that month.

I think it unnecessary to have recourse to any doctrine of lucid intervals to reconcile this testimony. Lucid intervals undoubtedly only apply to cases of insanity, properly so called; here there were no delusions, the infirmity insisted upon is decay of mind, and which, judging from all the evidence, I have no doubt existed to some extent, and I also believe that it was gradually getting worse; but it is not, as I believe, the fact, that in such a case of the gradual decay of the intellect, the sufferer is always less competent to remember or to think on every succeeding day than he was on the preceding day, and that this process goes on regularly and constantly, without any alteration. If it were so, it would be wholly at variance with our experience of all other conditions of the human intellect.

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The variation in the power of the intellect and the vigour of the mental faculties between one day and another is a matter which every one is conscious of to some extent, and which seems to depend on causes not readily perceptible or ascertainable. In persons in perfect health, the mind and the power of perception is more rapid at one time than another, the power of recalling names, dates, events, passages of authors formerly committed to memory, is occasionally more active and acute at some times than at others, even in persons in health, but still more so in cases of persons in ill health. It certainly would be a new fact to me, if it could be established, that in advanced old age, or in any of the stages of disease, the mind of the sufferer were not one day competent to do or remember what on another day he would fail in accomplishing. In fact, the evidence in this case, if it is believed, exactly proves this fact in the case of the testator. Mr. *Simpson* states, that on conversing with him on the 5th of *July*, he did not think the testator was in a competent state to give instructions for his will, and he refused to prepare any will in consequence; but on the 6th he considered him competent, and accordingly he obtained the instructions, he prepared the will and obtained the execution of it on the following day. I repeat, that the conduct of Mr. *Simpson*, in so acting, is evidence of his *bona fides*. Certainly, if the state of Mr. *Swinfen* on the 3rd and 4th of *July* were that of complete and perfect fatuity, I agree that it would not be possible to believe, that on the 6th and 7th he could have been competent to make a will, and I think, after a careful consideration of Dr. *Evan's* evidence, that that gentleman was convinced that the state of the old man was that of complete and perfect fatuity, or nearly approaching it, but I think that he must, if such was his opinion, have come to an erroneous conclusion.

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I know not that, in a mere question of testing the capacity of a decaying intellect to do any particular act, a medical man would much more than another man be competent to form a correct opinion. Some previous acquaintance with the person examined would seem to be a very necessary ingredient in coming to an accurate conclusion in such a matter; where any doubt about it exists, it may well be, that the habits and dispositions of a man may tend to produce a belief that he is in a state of fatuity, when, in truth, he is not so. If a man remain perfectly silent to all questions put to him, it may be very difficult to ascertain whether this arises from an incapacity to understand the question put to him, or to a sulky determination to answer nothing. Even the answers given to questions put may be tinctured with the same disposition, and bear the appearance of foolish or senseless words, when intended only to signify a surly dislike to be questioned. I think it may well be, that Dr. *Evan's* or any other physician of eminence might be mistaken as to the capacity of a man whom he had visited two days, consecutively, for the first time in his life, although the visits had lasted much longer than Dr. *Evan's* states his to have continued; but I think it impossible to believe, that a person in daily attendance on an old man should be deceived as to this point, and I think it difficult to believe, that any one well known to him, and who visited him daily for a considerable time, should be mistaken on this subject. The nature of the subject necessarily makes the evidence as to incapacity much less trustworthy than the evidence as to capacity. A physician, who visits a patient several times, may say, with perfect truth, I never saw a sign of intellect about him, and therefore I infer that he had none; still he may be mistaken, though he speaks perfect truth; but, on the other hand, if a person visits a patient and swears that he made rational answers to questions,

questions, and gave clear and distinct marks of his capacity, he cannot be mistaken; he must be perjured if his evidence be erroneous. It is the distinction between proving a negative in opposition to an affirmative, the one may speak perfect truth and yet be mistaken, the other cannot be mistaken, he must be perjured if his testimony be not correct.

I have therefore come to the conclusion, that the evidence of the three attesting witnesses and of Dr. *Evan's* is not inconsistent, having regard to the nature of the subject matter to which they depose, and I have the fullest conviction that they all conscientiously and honestly gave their testimony believing it to be true. I once more refer to the distinction I before mentioned regarding Mr. *Swinfen's* competency. That the state of Mr. *Swinfen* was not one of utter and complete fatuity, such as to preclude all doubt or question as to his competency, is clear from parts of Dr. *Evan's* testimony, for it is remarkable, that in the interview which he had with the testator, when Dr. *Rowley* was making some observations to Mr. *Swinfen* which might have had the effect of testing the extent of the capacity of the testator, Dr. *Evan's* interposed by an observation, which I construe thus:—"It is not proper for you to persuade that man to make a will, or to put words into his mouth as to the persons to whom his property is to be left, it ought to be his own spontaneous voluntary act." This, no doubt, was very right, if the object had been then and there to take instructions for the will, but if the object was simply to ascertain what the testator thought or wished, or was capable of thinking or wishing, it might have been more satisfactory to have known in what way the testator would have answered the question or suggestions of the medical man who was in the daily habit of attending him, even assuming those observations or suggestions to have been highly improper.

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It is not, however, necessary to pursue that subject into the channel to which it would lead, because the case of the Plaintiff is not, that undue persuasion was used to induce Mr. *Swinfen* to make the will in question, but that he was ignorant of what he was doing. The case is not one of undue influence, but is one of a concocted will, to which his unconscious signature was obtained.

Regarding the evidence of the three attesting witnesses and of Dr. *Evan's* together, if the case rested on their evidence alone, I should come to the same conclusion as the jury at law did; but there is further evidence in the case, and there certainly remain some circumstances which urgently require to be explained. First, how it was that Mr. *Simpson* should, on the 26th of *June*, have sent the instructions to Mr. *Cole* his agent in *London*, which are now in evidence, and which describes the state of Mr. *Swinfen* in the manner that is there set forth. I have carefully examined the evidence on this point, and although it is not so satisfactory as ought to be afforded, still I think that the explanation which he gives of that circumstance must be treated sufficient to account for it; at least, I have arrived at this conclusion, that the opinion he expressed to Mr. *Cole*, though inconsistent with his subsequent conduct, in preparing and attesting the will, and his present testimony, ought not to have weight to the extent of discrediting his present evidence in favor of the competency of Mr. *Swinfen*.

The next circumstances that require explanation are, the letters of the two ladies Mrs. *Rowley* and Mrs. *Lishman*, describing the state of health of old Mr. *Swinfen*. These undoubtedly shew their belief of his incapacity at the time they wrote, which was within a few days after the son's death, but the evidence satisfies

me

me that they had but imperfect means of forming an opinion, and these letters cannot, I think, be treated as more than an exaggeration of the failing condition of old Mr. *Swinfen's* mind and body, and they ought not, I think, to be allowed to counterbalance the direct testimony of the six witnesses, who speak positively to the contrary. I mean the three attesting witnesses, the nurse Mrs. *Taylor*, Mrs. *Charles Swinfen* and the Defendant.

The Defendant undoubtedly has a deep interest in the question: her evidence must necessarily be taken with great caution; but after reading it more than once, with great care, I see no reason for disbelieving any single word uttered by her. The unanimous testimony of all the witnesses, on all sides, so far as they have any bearing on the subject, shew perfect propriety of behaviour on her part throughout the whole transaction. She does not appear to have once asked the testator to give her the property, she took no part in the obtaining the instructions, she suggested no course to be taken, she objected to none that was thought proper by Mr. *Charles Swinfen*, Dr. *Rowley* and Mr. *Simpson*. It is but due to that lady to state, that this is my impression derived from a careful perusal of the whole evidence, and further, that if she had thought fit to exert her influence over him, she would probably have obtained still greater benefits from the testator.

I think it, as I have already stated, unnecessary and undesirable that I should comment, in detail, on the evidence of all the witnesses. I have stated the general view I take of the case, and the steps leading to the conclusion I have arrived at, and the grounds on which I have based my decision. I have, before doing so, read very carefully the most able and elaborate summing up

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up of the learned judge who tried this case, and who, I infer, from such perusal, had formed a different opinion on the whole case to that which I have arrived at. But his Lordship observed to me, in his letter transmitting the notes, "that he was not dissatisfied with the verdict, that it was eminently a question for the jury." And I find, that the jury, after having had the advantage of observing the manner and demeanour of the witnesses who gave their evidence, and notwithstanding the obvious tendency of the observations of his Lordship, had little doubt or hesitation in giving their verdict in favor of the will. I concur in that verdict, and I think it my duty to state, that if, on the evidence now before me, the jury had come to an opposite conclusion, and if the Defendant, instead of the Plaintiff, were here asking for a new trial, I should not have thought myself justified in concluding the rights of the parties without a further investigation. But on the case, as it now stands, and on the verdict given by the jury, I think that they have properly affirmed the capacity of the testator to make the will in question, and that this motion must be refused with costs.

Mar. 1. The cause came on to be disposed of as to the costs.

Scaife v. *Scaife* (*a*); *Tatham* v. *Wright* (*b*); *Berney* v. *Eyre* (*c*), were cited.

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In modern times, the inclination of the Court has been to place the heir at law in the same situation as other parties. I am desirous of looking at the authorities

(*a*) 4 *Russ.* 309.
(*b*) 2 *Russ. & M.* 32.
(*c*) 3 *Atk.* 387.

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rities to ascertain what ought to be done as to the general costs of suit. The costs of the supplemental bill have already been disposed of (*a*). The costs of the motion for a new trial I disposed of at the time. The costs of the first issue ought not, in my opinion, to be charged on either party; I am satisfied that the result arose from a mistake, for which neither party was to blame. It was accidental, and it is therefore impossible to make either of them pay the costs of it.

As to the second issue, I think that the heir at law, who failed, must pay the costs.

If the heir brings ejectment, and fails, he has to pay the costs of it. The heir having raised a case of incapacity of the testator, and every species of opposition to the will, I am of opinion that the costs of the issue must follow the result. I also am of opinion that he must pay the costs of the motion for a Receiver, for when I ordered it to stand over until the trial of the issue, it was intended that the motion should follow the result of the issue, and it is clear, in the result, that no Receiver should have been granted.

That disposes of all the costs except the general costs of the suit, as to which I wish to consider the allegations of the bill, especially the paragraphs which impute fraud and collusion.

On a subsequent day (the 5th of *March*, 1859),

The MASTER *of the* ROLLS dismissed the bill, as regarded the real estate, without further costs, and made a decree for the administration of the personal estate.

(*a*) 2 *De G. & J.* 398.

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June 13.

An improvident lease was granted by a charitable corporation to a trustee for the master. *Held*, after twenty years' enjoyment under it, that the rights of the *Attorney-General* to question its validity was barred by the Statute of Limitations (3 & 4 *Will.* 4, c. 27).

The decision in *Attorney-General* v. *Wyggeston Hospital* (12 *Beav.* 113) questioned by Vice-Chancellor *Kinderaley*.

THE object of this information was to obtain a declaration, that two leases, dated the 11th of *May*, 1816, and the 3rd of *April*, 1823, of property belonging to a charity called *Wyggeston Hospital*, and which leases had been granted by the hospital (a corporate body) to a trustee for Dr. *Selwyn*, the master of the hospital, were improper and fraudulent as against the charity, and to have them set aside, and for consequential relief.

The circumstances relating to the foundation, &c. of this charity are stated in the case of *The Attorney-General* v. *Wyggeston Hospital* (*a*), the decision in which case gave rise to the present information. The following were the circumstances of the present case:—In 1793, Dr. *Selwyn* was appointed master of the hospital. By a lease, dated the 11th of *May*, 1816, and made between the hospital (by its proper corporate name) of the one part, and *Thomas Pares* of the other part, in consideration of the surrender by *Pares* of two existing leases dated in 1806 and 1811, and of the rents and covenants thereinafter mentioned, the hospital demised part of the charity property to *Pares* for three lives, at a rent of 5*l.* 16*s.* and some other trifling reservations.

This lease was under the corporate seal, and was signed by Dr. *Selwyn* as the master of the hospital.

The rent was very inadequate, and *Pares* was a mere trustee for Dr. *Selwyn* the master, in whose favor he immediately afterwards executed a declaration of trust.

By

(*a*) 12 *Beav.* 113. It was suggested, during this argument, that the word "*comiserabuntur*" in 12 *Beav.* p. 114, had been wrongly copied from the letters-patent, and that it ought to have been "*conversabuntur*." See 6 *Viner's Ab.* 571, *pl.* 8.

By another lease, dated the 3rd of *April*, 1823, other part of the corporate property was similarly demised to *Payne* for three lives, at a rent of 1*l.* 6*s.* 6*d.* In this instance also the rent was very inadequate, and *Payne* was a mere trustee for Dr. *Selwyn* the master.

Dr. *Selwyn* died in 1823, having devised the leaseholds in trust for his daughter *Albinia Payne*, for her life, and subject thereto, upon trusts for her husband for life, with remainder to their children as they should appoint, and in default amongst them equally. The lease of 1823 was renewed in 1847.

There were eight children of *Albinia Payne* living, and in the years 1828, 1839, 1842, 1843 and 1847, respectively, and prior to the marriage of six of these children, one-eighth share of the leaseholds was duly appointed to each, and then settled on their respective wives, husbands and issue. The parties entitled under these settlements claimed to be purchasers "for valuable consideration, without notice of any fraud or irregularity in the granting or obtaining of the two leases." *Albinia Payne*, and her children, and the other Defendants claimed the benefit of the Statute of Limitations; but the information alleged, that this was a case of concealed fraud, and that the facts had only recently been discovered, pending the inquiries under decree in the *Attorney-General* v. *Wyggeston Hospital.*

Mr. *R. Palmer* and Mr. *Bevir*, for the Attorney-General.

First, the decision of Lord *Langdale*, in *The Attorney-General* v. *Wyggeston Hospital* concludes the question as to the right of the master of the hospital to grant leases on fines, and to appropriate them to his own use; this is a much stronger case, for the master is equitable

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equitable lessee. The master could not purchase the property, for he had fiduciary duties to perform, nor could he be both lessor and lessee of the charity property; *Attorney-General* v. *The Earl of Clarendon* (*a*). Secondly, the leases are improvident and void, they are in substance a partial alteration of the charity property; *Attorney-General* v. *Davey* (*b*); *Attorney-General* v. *Hall* (*c*); *Attorney-General* v. *Dixie* (*d*). Thirdly, the defence of purchaser for valuable consideration without notice is inapplicable to this case. At all events the tenant for life and the owners of the two-eighths which have never been settled cannot insist on that defence. Fourthly, the Statute of Limitations, 3 & 4 *Will.* 4, c. 27, cannot apply between landlord and tenant, and the *Attorney-General* v. *Magdalen College* (*e*), was a case of absolute alienation and not of a lease. Here there was both a trust and a concealed fraud affecting the master and those claiming under him, and such a case is excepted from the operation of the Statute of Limitations.

Mr. *Selwyn* and Mr. *Freeling*, for the Defendants, beneficially interested in the leases. The decision of Lord *Langdale*, in *The Attorney-General* v. *Wyggeston Hospital*, is not binding on the present Defendants, who were not parties to that information, it was filed against the corporation and the master alone, and its object was merely to have the practice of taking fines discontinued. There was clear authority to make these ordinances, and although they might be altered as the circumstances of the property and of the charity changed, still, while they existed, the acts done under them were perfectly valid. The Vice-Chancellor *Kindersley*, in *The Attorney-General* v. *Vansittart* (*f*), expressed serious doubts of the

(*a*) 17 *Ves.* 500.
(*b*) 19 *Beav.* 521.
(*c*) 16 *Beav.* 388.
(*d*) 13 *Ves.* 519.
(*e*) 18 *Beav.* 223; *reversed*, 6 *H. of L. Cas.* 189.
(*f*) 21 *Feb.* 1855, *MS.*

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the accuracy of that decision, and he held, in that case, that the representatives of Dr. *Vansittart*, the former master of *Wyggeston Hospital*, were entitled to retain the fines taken on leases like the present; if so, the leases themselves must be upheld by this Court.

The Statute of Limitations (3 & 4 *Will.* 4, c. 27, ss. 2, 3, 24, 25) is a complete defence in this case; the decision of the House of Lords, in *The Attorney-General* v. *Magdalen College* (*a*), is decisive on the point. The leases in 1816 and 1823 were a partial alienation, and possession has been retained under them ever since that period. The *Attorney-General* v. *Davey* (*b*), which was reversed by the full Court of Appeal on the 30th of *April*, 1859, was, like this, the case of a leasehold, and shews that the statute is applicable to that species of interest. Notice is immaterial; there was express notice in *Attorney-General* v. *Magdalen College*, but it did not avail. As to there being a trust, the master was not a trustee, and if he had been, his trust ceased in 1823, on his death; but here the lessors were a corporation, created by charter and confirmed by Act of Parliament, having the legal estate and holding on no trust whatever.

If a trust had existed, still it would be quite immaterial if the trust property has been alienated for valuable consideration, as in this case, for the remedy, if any, is against the trustee. In *Petre* v. *Petre* (*c*), the Vice-Chancellor *Kindersley* held, that even in the case of an express trust, a purchaser might set up the Statute of Limitations. Fraud there was none, it was an open notorious act, in accordance with an old established custom, and no one claiming under the corporation who granted the lease can say that it was concealed.

[*The*

(*a*) 6 *H. of L. Cas.* 189.
(*b*) 19 *Beav.* 521.
(*c*) 3 *Drew.* 371.

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[*The* MASTER *of the* ROLLS: I do not think it was a fraud.]

Lastly. The leases are themselves valid, for they are in accordance with a long immemorial usage; these renewals were consistent with a custom which is traced up to 1637, and Dr. *Selwyn* had, previous to these leases, purchased, for valuable consideration, the existing leases; he obtained renewals of them, on the usual terms, in consideration of the surrender of the existing lease. This Court will not disturb such leases renewed according to an immemorial custom; *Attorney-General* v. *Cross* (*a*); *Attorney-General* v. *Crook* (*b*).

It is no objection that the leases were granted in trust for the master. In *Wilson* v. *Sir Thomas Sewell* (*c*), where a lease had been granted by the Master of the Rolls, in trust for himself, under a power to lease contained in the 2 *Car.* 2, c. 49, the Court held, "that its being in trust for himself was no objection." And it was said, "it makes no difference with regard to the successor: he will receive the accustomed rent; and if the lease is, in all other respects, regular, it signifies nothing to the successor, whether one person or another gets the beneficial profit upon it." But even if the leases of 1816 and 1823 be held void, the effect will be to revive those surrendered; *Davison* d. *Bromley* v. *Stanley* (*d*).

The leases must therefore be supported under the usage, the ordinances, the Act of Parliament, the decision of the visitor in 1823, and that of Vice-Chancellor *Kindersley* in the *Attorney-General* v. *Vansittart*.

Mr. *E. Rodwell* for the corporation.

Mr. *Pearson* for the trustee of the leases.

Mr. *Bevir* in reply.

The

(*a*) 3 *Mer.* 524.
(*b*) 1 *Keen*, 121.
(*c*) 4 *Burr.* 1979.
(*d*) 4 *Burr.* 2210.

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June 11.

The MASTER *of the* ROLLS.

I do not think it desirable to enter into the question argued before me, which is one of some importance, whether the point, which is not decided by Lord *Langdale* in the *Attorney-General* v. *Wyggeston Hospital*, but is covered by his dictum in 12 *Beavan*, with respect to the validity of these leases, is correct or not: and the more so, because the matter has been seriously doubted by Vice-Chancellor *Kindersley* in that *Attorney-General* v. *Vansittart*. If I entered into that question, I should have to consider and weigh it more carefully than I have done. I consider it unnecessary, because I am of opinion that the Statute of Limitations is a bar, and because I cannot distinguish this case from the *Attorney-General* v. *Magdalen College* (*a*), by which, as it appears to me, the case is governed. In that case, there was a doubt as to the persons in whom the legal estate was vested, but there was no question that the land was in the possession of rector and churchwardens, and that they were empowered to make leases with the consent of the vestry, and that it was their duty to obtain the best rent and apply it for benefit of poor of the parish. They however sold the fee simple of the charity property to *Magdalen College*, who had the most distinct notice of the charitable trust. A more complete breach of trust could not have been committed, and that with complete notice to the alienees of the breach of trust; such at least was my opinion on the facts of the case. The House of Lords however held, that the claim of the poor was barred by the Statute of Limitations, and that there had been, during the interval, persons who had a right to bring an action, or suit, to recover the land. I compare that case with the present, and what is the difference. Here the alienation

(*a*) 6 *H. of L. Cas.* 189.

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alienation was a lease, but what difference can that possibly make? a lease is an alienation *pro tanto*. It might have been a lease for 999 years at a peppercorn rent, which would amount to an absolute alienation.

The next difference is, that the grantors in the *Attorney-General* v. *Magdalen College* were the rector and two churchwardens, here the grantor, in form, was the hospital itself, though in substance, I have no doubt it was the master.

Again, in *Magdalen College* the alienation was to a stranger, here it was to a trustee for the master. But, in my opinion, the character of the alienee cannot affect the question, it may affect the question of the breach of trust, and it might induce the Court to hold that the lease could not be supported, if granted to the master, though it could not be reconciled with the case in *Burrow* (*a*). But that does not affect the question when the adverse possession once began. If the alienee in the *Attorney-General* v. *Magdalen College* had been the rector, it is obvious that the question now before me and that before the House of Lords would be exactly the same. I cannot distinguish this case from the *Attorney-General* v. *Magdalen College*, and I think that as soon as the lease was granted the lessee held adversely to the rights of the charity, to the extent of the alienation contained in the lease. The consequence is, that as to *Payne's* lease, the adverse possession began in 1823, and as to the other lease that it began in 1816. In both cases the statute is a bar, and there were persons in existence who had a right to bring an action, or suit, to recover it. I am of opinion, therefore, the information must be dismissed, but without costs, as the Court induced these parties to institute the suit.

(*a*) *Wilson* v. *Master of the Rolls*, 4 *Burr.* 1975.

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July 21, 22.

A Court of Equity will not decree the specific performance of a contract to borrow a sum of money on mortgage.

In a case where the Court has no jurisdiction to grant a specific performance of a contract, it has no jurisdiction, under the 21 & 22 *Vict.* c. 27, to award and assess damages for its non-performance.

THIS bill, filed by *Rogers* against *Challis*, prayed that an agreement, concluded by two letters of the 17th and 18th of *December*, 1858, might be specifically performed; "or otherwise, that such compensation or damages might be awarded to the Plaintiff as this Court should deem just."

The agreement alleged and sought to be enforced was to this effect:—The Defendant *Challis* had agreed to borrow from the Plaintiff a sum of 1,000*l.*, to be repaid by four equal instalments, with interest at 10*l.* per cent., to be retained out of the sum advanced.

The security to be given was; first, a bill of sale of certain furniture, plate, linen, &c.; secondly, a bill for the first instalment; thirdly, a guarantee against the removal of the goods comprised in the bill of sale; and fourthly, by a deposit of the lease of *Webb's Hotel, Piccadilly*, and of the assignment of it, which had been made to *Challis*.

After this contract, the Defendant entered into negotiations with a Mr. *Reddish*, to borrow the 1,000*l.* from him on better terms. The Defendant refused to perform his agreement with the Plaintiff, who filed this bill on the 14th of *January*, 1859, alleging that if the contract should not be performed, he would suffer considerable damage, both by loss of interest on the money provided and set apart for the purpose of the loan, and also by reason of costs incurred in the course of the negotiations.

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On the 25th of *January*, and after the institution of this suit, the Defendant completed the loan from Mr. *Reddish*.

Mr. *Follett* and Mr. *Hobhouse*, for the Plaintiff.

First, the evidence proves a distinct contract. Secondly, the contract is such as a Court of Equity will specifically enforce. In *Adderley* v. *Dixon* (*a*), specific performance was decreed, at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankruptcy. Sir *John Leach* there explains the principle on which such relief is founded. He says, "Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." And he then refers to a case of *Taylor* v. *Neville*, in which specific performance was decreed of a contract for the sale of 800 tons of iron; and to *Ball* v. *Coggs* (*b*), in which specific performance was decreed, by the House of Lords, of a contract to pay the Plaintiff a certain annual sum for his life, and another sum for every hundredweight of brass wire manufactured by the Defendant during the life of the Plaintiff.—[*The* MASTER *of the* ROLLS referred to *Brough* v. *Oddy* (*c*), in which it was held, that a Court of Equity would not entertain a bill

(*a*) 1 *Sim. & S.* 607.
(*b*) 1 *Bro. P. C.* 140.
(*c*) 1 *Russ. & M.* 55.

a bill for the specific performance of an agreement to pay in a certain event, which had happened, an annual sum by quarterly instalments.]—In *Bass* v. *Clivley* (*a*), specific performance was decreed of an agreement to lend 3,000*l.* on mortgage (*b*). Thirdly, but if the contract cannot be specifically performed, then the 21 & 22 *Vict.* c. 27, s. 2, enacts, that when "the Court of Chancery has jurisdiction to entertain an application" for the specific performance of a contract, it may "award damages to the party injured, either in addition to or in substitution for such specific performance," and it then gives power to the Court to assess such damages. This is the very case which was intended to be met by this enactment; for this bill being filed on the 14th of *January*, 1859, the Defendant completed his loan from *Reddish* on the 26th of the same month.

Mr. *R. Palmer* and Mr. *Hingeston*, for the Defendant, were not called on.

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I am clear that the Court has no jurisdiction in this case.

I must first consider how the matter stands, independently of Sir *Hugh Cairn's* Act, and next, the effect of that Act. The case cannot be put higher than this:—that the Defendant applies to the Plaintiff for the loan of 1,000*l.* upon a security which he specifies, and the Plaintiff assents to the proposal, but on the next

(*a*) *Tamlyn*, 80.

(*b*) But the Defendant, in that case, said (page 81) she had always been, and still was, desirous to have the agreement carried into execution, "which she submitted she was entitled to have done."

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next day the Defendant says, "I have changed my mind, I do not require your 1,000*l.* I can get it upon better terms elsewhere." Is that a case in which a person can come to this Court for a specific performance, and say, "you, the Defendant, are bound to let me advance the 1,000*l.* to you,—it is true your circumstances may be altered, but you are bound to let me advance the money to you?" It is very justly said, that the Statute of Frauds does not apply to such a case; therefore, if the Court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together, and one says, "will you lend me 100*l.*, at 5*l.* per cent. for a year upon good security," and the other says "I will," that conversation might be made the subject of a suit for specific performance in this Court, if on the next day one friend should say "I do not want the money," or the other should say "I will not lend it." Nothing would be more difficult and more dangerous than the task which this Court would have to perform, if it were to investigate cases of that description. This is not an agreement to purchase or sell anything, it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be paid for by instalments and in a particular manner, in which case the Court has held, that these were circumstances which took the transaction out of the rule of this Court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this Court. It is nothing more than this:—a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, I do not want the money, and I have got it elsewhere, upon better terms. It certainly is new to me, that this Court has ever entertained

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entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The Court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said, that the remedy here is inadequate or defective? It is a simple money demand; the Plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the Plaintiff has sustained. I express no opinion whether an action would, or would not, lie in such a case as this; but I am satisfied that before Sir *Hugh Cairn's* Act, this Court would not have entertained jurisdiction in such cases. If I recollect right, there is a case in the books (*a*) which decides that an agreement to fill up a gravel pit is not one of which this Court will decree the specific performance. I apprehend it would have startled some of the judges of this Court to hear that its jurisdiction in specific performance extended to the case of agreements to lend moneys. How could it be? The case of a contract for the purchase of stock in the funds, at a particular price, is a much stronger case; for the injury arising from its non-performance might be much greater and more uncertain than in the case of an agreement to borrow a sum of money on particular terms, nevertheless specific performance in a case of stock has repeatedly been refused (*b*). It appears to me, therefore,

(*a*) *Flint* v. *Brandon*, 8 *Ves.* 159.

(*b*) *Cud* v. *Rutter*, 1 *Peere W.* 570; *Nutbrown* v. *Thornton*, 10 *Ves.* 161; *Mason* v. *Armitage*, 13 *Ves.* 37; *Doreson* v. *Westbrook*, 5 *Vin. Ab.* 540.

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therefore, to be contrary to every principle on which this Court has acted, to say, that this is a case in which, independent of Sir *Hugh Cairn's* Act, this Court has jurisdiction to decree a specific performance: always bearing in mind that the Court grants specific performance only in cases where the remedy at law is inadequate and defective, and also the observations made by Lord *Eldon* (*a*), that though the Court exercises a discretion in cases of specific performance, yet that it is to be exercised according to fixed rules and principles, and not arbitrarily.

Next, as to Sir *Hugh Cairn's* Act (21 & 22 *Vict.* c. 27). This gives the Court jurisdiction to award and assess the amount of damages in certain cases. The only one which applies to this is, where the Court has jurisdiction to entertain an application for specific performance. I am of opinion it has none here, and I think that it would be productive of very serious evil, if in cases which are the proper subjects of an action for damages, or in cases of assumpsit upon an agreement of some sort, a party could come here for a specific performance of it, or for damages; thus throwing upon a Court of Equity the functions which properly belong to a jury. I think this is not the meaning of Sir *Hugh Cairn's* Act, and that it is not desirable to extend it to such cases.

This is a matter proper for the determination of a Court of Law, the questions being, first, whether an action of assumpsit will lie upon an agreement to borrow money, and secondly, the amount of the damage which the Plaintiff has sustained.

I am of opinion that the bill must be dismissed with costs.

(*a*) *White* v. *Dumon*, 7 *Ves.* 35.

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BROOKE *v.* PEARSON.

July 4, 5.

By a marriage settlement a rent-charge out of the husband's property was to become payable to his wife if he mortgaged it or became bankrupt. He mortgaged it first and afterwards became bankrupt. *Held*, that a valid rent-charge having arisen upon the mortgage, it was not avoided by a subsequent bankruptcy.

IN 1854, *William Pearson* married *Elizabeth Josselyn*. He was seised of a real estate of the value of about 17,400*l.*, subject to a mortgage of 5,000*l.*, and the portion of his intended wife consisted of 1,000*l.* A settlement was executed prior to the marriage, and dated the 18th of *May*, 1854, which recited, that "upon the treaty for the intended marriage it was agreed, that the fortune or portion of *Elizabeth Josselyn*, amounting to the sum of 1,000*l.*, should be paid or made over to *William Pearson*, and that *William Pearson* should be entitled to receive, for his own use, whatever personal estate should happen, legally or equitably, to be given or come to or devolve on *Elizabeth Josselyn* during her intended coverture; and that in consideration of the premises he should" settle his real estate upon the trusts thereinafter declared. It then witnessed, that in consideration of marriage, and of the 1,000*l.* paid to *William Pearson*, he conveyed his real estate to trustees, upon trust during the joint lives of *William Pearson* and *Elizabeth Josselyn*, to pay all the rent thereof to *William Pearson*, "until he should sell, mortgage, assign, charge, or in any way encumber, all or any part of the same rents, issues and income before the same should have become due and payable, or (whichever event should first happen) until there should be an assignment, in fact or by operation of law, of all or any part of the rents, issues and income, by reason of the *bankruptcy* or insolvency of *William Pearson*, or otherwise howsoever. And from and immediately after *William Pearson* should sell, mortgage, assign, charge or in any manner encumber all

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all or any part of the said rents, issues and income before the same should have become due and payable, or there should be an assignment, in fact or by operation of law, of all or any part of the rents, issues and income by reason of the *bankruptcy* or insolvency of *William Pearson*, or otherwise howsoever, then upon trust, that, during the joint lives of *William Pearson* and *Elizabeth Josselyn*, the said trustees or trustee for the time being should, from time to time, retain" 300*l.* out of the rents, and pay that sum yearly to *Elizabeth Josselyn*, for her separate use without power of anticipation, and pay the residue of the rents to *Wm. Pearson*. Then followed trusts for the benefit of the wife and children of the marriage, which it is unnecessary to state in detail.

The marriage took effect, and there were issue three children.

By indenture dated the 28th of *July*, 1855, *Wm. Pearson* conveyed the property to *Bennet* and another, by way of mortgage to secure 2,000*l.*

On the 8th of *April*, 1858, *Wm. Pearson* conveyed also his real and personal estate to a trustee for the benefit of his creditors, and in *July* following he was adjudged bankrupt.

The trustees of the settlement sold the estate for 17,400*l.*, but being unable to complete, in consequence of the disputes, they filed this bill against *Pearson* and his wife, children, assignees and mortgagee, to have the rights and interests of the several parties determined.

Mr. *Lloyd* and Mr. *Whitbread*, for the Plaintiffs the trustees.

Mr.

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Mr. *Selwyn* and Mr. *Woodroffe*, for the assignees in bankruptcy. A man cannot settle his own property so as to make his interest in it determinable on his bankruptcy. It would be a fraud on the bankrupt laws, its object being to defeat their operation, and the rights of the creditors under them. Here the husband was not to have an estate for life in his own property, but there is an attempt, in the case of his becoming bankrupt, to intercept the rights of his creditors, by giving a large rent-charge nominally to his wife, but substantially for the benefit of himself and family. The authorities are distinct, that a rent-charge cannot be so limited, as to take effect in favor of a wife only upon the husband's bankruptcy; *Lester* v. *Garland* (*a*); *Re Meaghan* (*b*); *Higinbotham* v. *Holme* (*c*); *Holmes* v. *Penney* (*d*); *Stonor* v. *Curwen* (*e*); *Higginson* v. *Kelly* (*f*); *Ex parte Young* (*g*); *Phipps* v. *Lord Ennismore* (*h*). The settlement is only good to the extent of the wife's jointure.

Mr. *Follett* and Mr. *Turner*, for the mortgagees.

Mr. *R. Palmer* and Mr. *Regnier Moore*, for the wife and children. There are several events independent of bankruptcy, on the happening of either of which the rent-charge might properly take effect. If either of such events happened before the bankruptcy, the rent-charge would arise and be valid, and would not be affected by a subsequent bankruptcy. [*The* MASTER *of the* ROLLS. Must not the validity of this limitation be determined as at the date of the settlement; what would have been the effect if the bankruptcy had happened first?] The order of events make all the difference; if the

(*a*) 5 *Sim.* 205.
(*b*) 1 *Sch. & Lef.* 179.
(*c*) 19 *Ves.* 88.
(*d*) 26 *L. J., Ch.* 179.
(*e*) 5 *Sim.* 264.
(*f*) 1 *Ball & B.* 252.
(*g*) 3 *Madd.* 124.
(*h*) 4 *Russ.* 131.

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the bankruptcy had taken place first, all the property would have then become vested in the assignees, and could not afterwards be taken out of them. Here on the execution of the mortgage to *Bennet*, the wife's right to the rent-charge arose, and it was not determined by the subsequent bankruptcy of her husband, nor did it depend upon it.

Mr. *Selwyn*, in reply.

The MASTER *of the* ROLLS.

July 5. I am of opinion that this is a good rent-charge of 300*l.*

I at one time thought that this clause in the settlement was void *ab initio*, and if so, the validity of the rent-charge could not depend on the circumstance whether the bankruptcy occurred before or after the rent-charge came into existence. But, on consideration, I am of opinion that this is not so, and that the limitation of the rent-charge to the wife was not void in the first instance; but that the question is, whether the rent-charge was in existence at the time when bankruptcy took place? Supposing the case had been this:—that upon the bankruptcy or insolvency, or upon any assignment by operation of law, the annuity of 300*l.* a year was to be raised out of the husband's estate, for the separate use of the wife, without power of anticipation. There can be no question that there was good consideration for the settlement; but what occurs upon the bankruptcy of the husband is this: all his property passes to his assignees, and there remains nothing out of which the rent-charge can be raised. The

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The Court has, however, held, even in these cases, that all money which comes from the wife must be replaced and restored to her.

Here, the rent-charge was to arise on the husband mortgaging the property, or upon an assignment by deed, or by operation of law, by reason of the bankruptcy of Mr. *Pearson*. That being the clause in settlement, when he mortgaged the property the rent-charge arose, and was, therefore, in existence at the time of the bankruptcy. It is not necessary to go into the question, whether the rent-charge has priority over the mortgage, because that matter is arranged between the parties; but I am of opinion, that the rent-charge was in existence at the time of the bankruptcy, and therefore that it did not pass to his assignees as part of his property.

I am of opinion, therefore, that this is a good and subsisting rent-charge, notwithstanding the fact that the husband has become bankrupt, and all the rest of the property passed to assignees. I will make a declaration to that effect.

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FITZ ROY *v.* THE DUKE OF RICHMOND.
(No. 1.)

June 14.

A testator, a widower, appointed a trust fund, over which he had an exclusive power of appointment, in favor of his children, "to be equally divided among my sons, and also any other sum of money that I may die possessed of." He had previously named all his children. *Held*, that the sons took as a class, and that those who survived the testator were entitled to the whole fund.

IN 1820, on the marriage of Sir *Charles Fitz Roy* with Lady *Mary Lennox*, a settlement was executed, by which certain funds were vested in trustees, in trust for Sir *Charles* for life, with remainder to Lady *Mary* for life, and after the decease of the survivor upon trust "for all and every, or such one or more, exclusively of the others or other, of the children" of the marriage as Sir *Charles* and Lady *Mary* should appoint, and in default as Sir *Charles*, in case of his surviving Lady *Mary*, should appoint, and in default of appointment, then for the children equally.

There were four children of the marriage, *Augustus*, *George*, *Arthur* and *Mary*, all of whom attained twenty-one. A joint appointment had been made of 2,000*l.* in favor of the daughter.

Lady *Mary* died on the 7th of *December*, 1847, and on the 18th of *December*, 1847, Sir *Charles* made his will, to the following effect:—

"Memorandum of my wishes in case of my death.

"Sydney, N. S. Wales, 18th December, 1847.

"It is my desire that (with the exceptions hereinafter mentioned) the whole of my plate, furniture, glass, china, house linen, carriages, horses and all other property which I may possess at the time of my death, either in this colony or elsewhere, should be disposed of by public or private sale, according as my dear son *George Henry* may

may consider to be most advantageous. The sum to be realised by such sale to be equally divided between my three sons *Augustus Charles Lennox*, *George Henry*, *Arthur George* and my daughter *Mary Caroline*, or as many of them as may be then living."

He subsequently proceeded as follows:—"The funded property confided to trustees under my marriage settlement in 1820 is, I believe, left at my disposal (as the survivor), as far as appropriating the shares to each of my children, but of this fund the sum of 2,000*l.* was settled, at her marriage, upon my daughter *Mary*, the remainder I wish to be *equally divided among my sons*, as also any other sum of money that I may die possessed of."

In *September*, 1855, the eldest son *George* was killed in the *Redan*, at *Sebastopol;* his brother *George* was his personal representative.

Sir *Charles* afterwards, in the same year, married again, and he died in *February*, 1858, leaving his two sons and his daughter surviving. Under the above circumstances, a question arose as to the construction of the appointment of the trust fund contained in the will.

Mr. *R. Palmer*, and Mr. *Hobhouse* for the Plaintiff *Arthur*, contended that the effect of the will was to appoint the whole trust fund (*minus* the 2,000*l.* already appointed) to the sons of the testator who survived as a class, and that consequently *Arthur* and *George* were entitled to the fund in equal shares.

Mr. *Farrer*, for the daughter *Mary*, contended that the appointment was to the three sons equally; and as to the one-third share intended for *Augustus*, that it had failed

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FITZ ROY v. THE DUKE OF RICHMOND. (No. 1.)

failed by his death in the testator's lifetime, and went as unappointed amongst the children equally; *Ackerman* v. *Burrows* (*a*); *Leigh* v. *Leigh* (*b*).

Mr. *Selwyn* and Mr. *Fremantle*, for *George*, contended that the appointment was to a class.

They cited *In re Ham's Trusts* (*c*); *Lee* v. *Pain* (*d*); *Cruse* v. *Howell* (*e*).

Mr. *Leigh* for the trustees.

The MASTER *of the* ROLLS.

June 14. I have no doubt, upon the construction of this will, that the word "sons" is a general designation of the class. In the first place, not only is the general rule clearly established, but none of the cases which have been cited appear to be any violation of it, except where there is a designation of particular persons.

In this will the testator gives, not merely the remainder of the fund in the settlement, but also "any other sum of money that he might die possessed of." He gives the general residue of his money to his sons, and this would clearly include all his sons. When a person uses words which only designate a class, he leaves it to the law to determine what that class may consist of. No doubt the sons of the second marriage would not have been entitled to take any part of the fund settled in favor of the issue of the first marriage exclusively;

(*a*) 3 *Ves. & B.* 54.
(*b*) 17 *Beav.* 605.
(*c*) 2 *Sim.* (*N. S.*) 106.
(*d*) 4 *Hare*, 225.
(*e*) 4 *Drew.* 215.

exclusively; but that cannot affect the meaning of the words, which designate a general class.

It is also to be observed, when the testator speaks of his children, mentioning them by name, in the former part of his will, he confines the gift to such as shall be living at his death. If he intended the same class to take in the second instance, he had only to say "his said children;" for then as many of them as might be living at the time of his death would take. But he intended to exclude the daughter, and he intended to give it to the sons as a class. It would be a dangerous principle, in construing a will, to introduce any word where it is not required. If I inserted the word "said," and made it run thus: "to be divided amongst my said sons," I should be introducing a word which would convert a class, according to the ordinary meaning of the words, into a designation of particular persons, for the purpose of creating an intestacy, and if the testator had had a son by his second marriage, I should exclude that son from taking a share in the general residue of his moneys not included in the settlement.

I am of opinion that "sons" generally, in the fullest acceptation of the term, are meant, that the class is to be ascertained at the death of the testator, and that those only who survived him can take.

1859.

FITZROY *v.* THE DUKE OF RICHMOND.
(No. 2.)

June 14, 16.

Parents had life interests in a sum of money, with power to appoint it to their children. On the marriage of an infant daughter, by a settlement to which she and her intended husband were parties, the parents appointed the reversionary fund to trustees, on trust for the daughter, the intended husband and the children of the marriage. The daughter and her husband survived the parents. *Held*, that the appointment to the husband and children, though not objects of the original power, was valid, notwithstanding the infancy of the daughter.

SIR *Charles* and Lady *Mary FitzRoy* had life interests in a sum of 12,400*l.*, with a joint power of appointing it in favor of the children of their marriage.

Their daughter, *Mary Caroline*, married her present husband in the month of *August*, 1841, when she was but seventeen years of age. By the deed of settlement executed on that occasion, dated the 9th of *August*, 1841, and made between her intended husband of the first part, *Mary Caroline FitzRoy* of the second part, Sir *Charles Augustus FitzRoy* and Lady *Mary FitzRoy* of the third part, and two trustees of the fourth part, it was witnessed, that Sir *Charles Augustus FitzRoy* and Lady *Mary FitzRoy* did bargain, sell, assign, transfer and set over unto the trustees, from the period of the decease of them the said Sir *Charles Augustus FitzRoy* and Lady *Mary FitzRoy*, the sum of 2,000*l.* (part of the 12,400*l.* they had power to appoint), upon trust for the intended husband for life, with remainder to the intended wife for life, and, after the death of the survivor, for the children of their marriage.

Mr. *R. Palmer* and Mr. *Hobhouse* appeared for the Plaintiff, one of the sons of Sir *Charles* and Lady *Mary*.

Mr. *Selwyn* and Mr. *Fremantle* contended that the appointment of the 2,000*l.* to the husband and children of *Mary Caroline FitzRoy*, who were persons not within the limits of the power, was unauthorized and invalid. That the daughter being a minor on her marriage,

marriage, the settlement could not be considered as an appointment to her and a subsequent settlement made by her, for she was incapable, by reason of her infancy, of making any such settlement; *Tucker* v. *Sanger* (*a*); *Birley* v. *Birley* (*b*).

That the interest in the fund appointed being in the nature of a reversionary interest in a *chose in action*, the transaction could not be supported as a settlement made by the husband alone of the personal estate of his wife vested in him *jure mariti*.

Mr. *Farrer*, in support of the appointment, argued that, in substance, the appointment was in favor of a child of Sir *Charles* and Lady *Mary FitzRoy*, and that, although she was an infant at the time, her husband, who became entitled to the fund in her right, had full power to settle it. That his power over the reversionary interests of his wife was absolute unless his wife's surviving him before it fell into possession, which had not happened in this case. He cited *White* v. *St. Barbe* (*c*); *In re Gosset's Settlement* (*d*); *Limbard* v. *Grote* (*e*); *Routledge* v. *Dorril* (*f*); *Chance on Powers* (*g*); *Sug. Pow.* (*h*); *Langston* v. *Blackmore* (*i*).

Mr. *Leigh* for the trustees.

The MASTER *of the* ROLLS.

In this case, I think that the settlement may be supported, although Mrs. *Steward* was, in fact, an infant at

(*a*) *M'Clel.* 424; *S. C.*, 13 *Price*, 607.
(*b*) 25 *Beav.* 299.
(*c*) 1 *Ves. & B.* 399.
(*d*) 19 *Beav.* 529.
(*e*) 1 *Myl. & K.* 1.
(*f*) 2 *Ves. jun.* 357.
(*g*) *Page* 353.
(*h*) *Vol.* 2, *p.* 261 (*7th edit.*)
(*i*) *Amb.* 289.

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at the time of the marriage and when the settlement was executed. The circumstance of the fund being reversionary does not, I think, affect the question. In *White* v. *St. Barbe*, it appears the interest was reversionary, and Lord *St. Leonards* treats it as a valid settlement, although the property was in expectancy.

The question of the infancy I considered doubtful; but the ground on which Lord *St. Leonards* puts the case, namely, that the husband can dispose of the property of the wife in expectancy against every one except the wife, him surviving, applies, just as much to the case of an infant as it does to the case of an adult woman. The ground on which one of the cases seems to have been favorably entertained by the Court, and which applies especially to the case of an infant, is this:—that the settlement was one, which, if the infant had been a ward of Court, the Court would have approved of, and which would have been binding on that infant. Accordingly, in that view of the case, I think that this must be treated on the same principle as *Routledge* v. *Dorril*(*a*), and that class of cases, in which the fund is considered as first appointed to the daughter, and then settled by the husband for the benefit of the children of the marriage.

Being of that opinion, I will make a declaration that the 2,000*l.* was well appointed.

(*a*) 2 *Ves. jun* 357.

1859.

FOORD and others *v.* BAKER.

July 4.

A scheme, made in 1855, provided, that no person should act as trustee of the charity, who should hold or occupy any part of the charity property. At that time, one of the trustees held a small piece of charity land, under a twenty-one years' lease granted in 1847 by public tender. *Held*, that he must either give up the lease or the trusteeship.

THIS was a special case, which stated to the following effect:—A charity, for the benefit of poor travellers or wayfaring men, was established at *Rochester*, called "*Watts's Charity.*"

Prior to 1836 *Thomas Baker* was appointed, and still remained, a trustee of the charity.

A small portion of the charity estates consisted of about a quarter of an acre of ground, adjoining the *Satis House* estate, and which, for upwards of half a century, had been held by the owner, for the time being, of the *Satis House* estate, under leases for twenty-one years, from time to time granted by the charity trustees.

On the expiration of the last lease, the piece of ground was again let by the trustees of the charity by tender, and a new lease was, on the 5th of *October*, 1847, granted to *George Baker* and the Defendant *Thomas Baker*, as executors, for twenty-one years, at the yearly rent of 3*l.*, no other tender having been made.

In the year 1850, the Defendant *Thomas Baker* alone became beneficially interested in the *Satis House* estate, which, with the lease, was conveyed to him, and he was now in possession of the piece of charity ground.

In 1855, a scheme was settled and approved of by the Court for the future management and regulation of the charity, which provided as follows:—

"1. The charity and the lands and property thereof

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shall be under the management and control of the municipal trustees for the time being of the city of *Rochester*."

"18. The trustees shall, from time to time, let the charity property, at the best annual rent that can reasonably be obtained, for any term not exceeding twenty-one years," &c. &c.

"20. No person shall act as trustee who shall, directly or indirectly, take a lease of or hold or occupy the estate and property belonging to the charity or any part thereof, or any interest therein, for his own benefit or for the benefit of any person or persons whomsoever."

The sixteen Plaintiffs and the Defendant were the municipal trustees of the city of *Rochester*, and as such were trustees of *Watts's Charity*.

The Plaintiffs alleged, that *Thomas Baker* was the holder or occupier of the piece of ground comprised in the lease of 1847 within the meaning of the 20th section of the scheme, and that he was thereby disqualified from acting as a trustee of *Watts's Charity*.

The Defendant *Thomas Baker*, however, insisted that the 20th section of the scheme did not apply to his case, as he was appointed trustee of the said charity in 1836, many years before the scheme came into operation, and that it did not and was not intended to disqualify him or to prevent him from acting as a trustee of the charity under the circumstances.

By this special case the Plaintiffs proposed the following questions for the opinion of the Court:—

1. Whether the Defendant *Thomas Baker* can, under the circumstances above mentioned, lawfully act as one of

of the trustees of *Watts's Charity* during the continuance of the lease of 1847.

2. Whether the Defendant *Thomas Baker* can, under the circumstances above mentioned, lawfully act as one of the trustees of *Watts's Charity* during such time as he shall continue to hold or occupy the piece of ground comprised in the lease of 1847, either under or by virtue of the same lease or otherwise.

Mr. *Speed* for the Plaintiffs. The object of the Court was to prevent the conflict of interest and duty, and prevent a trustee filling the inconsistent characters of lessor and lessee. The 20th clause of the scheme is distinct that no person shall act as a trustee who shall hold any part of the charity property.

Mr. *Osborne* for Mr. *Baker*. This property is so small as to be of little value, and is so situate as to be only useful to the owner of the adjoining property. It has been in the possession of the Defendant's family for more than half a century, and was let for its full value by public tender in 1847. When the scheme was prepared the Defendant was known to be lessee of the property, and the rule was not intended to apply to an existing case, or else he would have been removed.

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I am of opinion that a clause of this description must be construed strictly, and that no person who exercises the duties of trustee or acts as such ought to be allowed to have anything whatever to do with, or have any beneficial interest in, any part of the charity property. The Defendant, who is the leseee of a portion of the charity

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shall be under the management and control of the municipal trustees for the time being of the city of *Rochester*."

" 18. The trustees shall, from time to time, let the charity property, at the best annual rent that can reasonably be obtained, for any term not exceeding twenty-one years," &c. &c.

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The MASTER *of the* ROLLS.

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charity estate, cannot act as trustee; he must either give up the lease or the trusteeship. He must not have anything to do with this piece of land so long as he remains a trustee.

I will answer both questions in the negative.

DREWETT *v.* POLLARD.

June 29.

A testator gave a sum of stock, producing 180*l.* per annum, in trust to pay life annuities of 20*l.* each to seven persons, and at the decease of any, to accumulate his annuity, and after the death of the last annuitant, to divide the stock and accumulations amongst the surviving children of the annuitants. *Held*, that this was not within the exceptions of the *Thellusson* Act of "portions" for "children" of persons taking an interest under the will, and that the trust for accumulation beyond twenty-one years after the testator's death was void.

THE testator *William Holt* died in 1823. By his will, he bequeathed as follows:—

"I will that my executors do purchase the sum of 3,500*l.* New £4 per Cent. Annuities, to be transferred into their own names, the interest of which I direct to be paid half-yearly to the following of my kindred (being an annuity for each of them 20*l.* during their natural lives respectively), and at the decease of any or each of them, the annuity before paid to such deceased to be added to the principal sum of stock to *accumulate*; first to *William Lowcock*," of &c. second to *Mary Pearson*, third to *Ellen Marsden*, fourth to *Martha Chester*, fifth to *John Pollard*, sixth to *Lowcock Pollard*, and seventh to *Mary Starkey*, "and after the decease of the latest survivor of the above-named annuitants, then I direct my executors to sell the said principal sum of 3,500*l.* New £4 per Cent. Annuities, with the *accumulation*, and to divide the proceeds in money *amongst the surviving children of the above-named seven annuitants*, share and share alike."

After the testator's death, his executors purchased the sum

sum of 3,500*l.* New £4 per Cent. *per annum* Annuities in their names.

Lowcock Pollard survived all the other six annuitants, and he died in 1858. Eleven children of the annuitants survived him. The trust fund and the accumulations now amounted to 7,559*l.* New £3 per Cent., and this bill was filed by the surviving executor, to obtain a declaration of who were the persons entitled to the fund.

Mr. *R. Palmer* and Mr. *Currey*, for the Plaintiff, argued that the trust for accumulation, so far as it extended beyond twenty-one years from the death of the testator, was void under the *Thelluson* Act (39 & 40 *Geo.* 3, c. 98), and that the case did not come within the exception contained in the second clause of that act in favor of a provision for "raising portions," of "children" of the persons taking "any interest under the will;" for such exception applied only to children taking immediately on the death of their parent, and not to those taking by survivorship after a series of life estates. They cited *Barrington* v. *Liddell* (*a*); *Edwards* v. *Tuck* (*b*); *Bourne* v. *Buckton* (*c*); *Eyre* v. *Marsden* (*d*); *Burt* v. *Sturt* (*e*); *Viner's Abridg.* "*Portions*;" *Wildes* v. *Davis* (*f*).

Mr. *Selwyn* and Mr. *Lindley*, for the surviving children, argued that the case came within the exception of the act, and that the whole accumulations were valid, for here there were strictly portions provided for the children of the annuitants alone. They cited

(*a*) 2 *De G., M. & G.* 480.
(*b*) 3 *De G., M. & G.* 40; 23 *Beav.* 268.
(*c*) 2 *Sim.* (*N. S.*) 91.
(*d*) 2 *Keen*, 564.
(*e*) 10 *Hare*, 415.
(*f*) 1 *Sm. & G.* 475.

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cited *Middleton* v. *Losh* (*a*); *Beech* v. *St. Vincent* (*b*); *Barrington* v. *Liddell* (*c*).

The MASTER *of the* ROLLS.

I think that this case is governed by the authorities, and that it is not within the exception of the 2nd section of the *Thelluson* Act. It is governed by *Burt* v. *Sturt*, and *Edwards* v. *Tuck*. The trust for accumulation after twenty-one years from the testator's death is void, and the accumulation beyond that period falls into the residue.

GRIMES on behalf, &c. *v.* HARRISON. (No. 2.)

June 16.

The sum of 800*l.* only was recovered in a suit. *Held*, nevertheless, that the costs were not taxable upon the lower scale, the object of the suit not being limited to the recovery of that sum.

THE directors of a benefit building society had assumed to act as a land society, and had contracted to purchase an estate from *Syers* for 2,300*l.*, of which they had paid 800*l.* out of the funds of the society. This suit was instituted (*d*) on behalf of all the members of the society, against the seven directors, the two trustees and *Syers* (the vendor), insisting that the purchase was a breach of trust both on the part of the directors and trustees and of *Syers*; that it was a collusive and improper purchase, and that the trustees ought to be removed. It prayed, 1. That *all* the Defendants might be declared liable to replace a sum of 800*l.* paid to *Syers* as part of the purchase-money, and that it might be paid to new trustees. 2. That two new trustees might be appointed. 3. That the old trustees might transfer "the other moneys and property of the said

(*a*) 1 *Sm. & G.* 61.
(*b*) 3 *De G. & S.* 678.
(*c*) 2 *De G., M. & G.* 98.
(*d*) *Reported, ante*, 26 *Beav.* 435.

said society to such new trustees or otherwise as should be right." 4. That, if necessary, the society might be dissolved and wound up.

The Court, at the hearing, held, that the seven directors were alone liable for the 800*l.* The Plaintiffs thereupon neither asked to remove the trustees nor to wind up the society. The decree simply declared the seven directors liable for the 800*l.*, and they were ordered to pay that sum to the old trustees, and to pay the Plaintiff's costs.

An application was now made to the Court for directions as to the taxation of the costs.

Mr. *Cracknall* and Mr. *W. Morris*, for the directors. As 800*l.* only has to be dealt with in this suit, the costs ought to be taxed according to the lower scale. This case comes within the Orders of the 30th of *January*, 1857 (*a*), which, after mentioning six cases in which the lower scale is to be charged, proceeds to the seventh of "special cases," &c. &c., "and generally, in all other cases, where the estate or fund *to be dealt with* shall be under the amount or value of 1,000*l.*" Here the amount or value to be dealt with is merely 800*l.*, the Plaintiffs having waived the other relief. *Reade* v. *Bentley* (*b*), and *Gibbs* v. *Gibbs* (*c*) were cited.

Mr. *Southgate, contrà*, was not heard.

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The Order provides that, in suits for the administration of estate or dealing with trust funds, if the estate or funds

(*a*) *Consol. Orders, pp.* 195, 196.

(*b*) 3 *Kay & J.* 280.

(*c*) 27 *L. J., Chanc.* 577.

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GRIMES, On behalf, &c. v. HARRISON. (No. 2.)

funds are under 1,000*l.*, the lower scale of costs is to be charged, but in those cases it seems obvious, from the first rule, that it does not depend on the sum recovered or the interest which the Plaintiff is entitled to in the fund, but on the amount of the estate.

This is not the case of a dealing with a particular fund, but one in which the Plaintiffs make claims against the Defendants in respect of mismanagement and breaches of trust, and asking that all the Defendants may be made liable for a particular sum of 800*l.* The property to be dealt with is, in fact, the whole property of the society.

I am of opinion, that the case does not come within the first six rules, nor within the seventh, which relates to cases where the estate or fund to be dealt with shall be under the amount or value of 1,000*l.*, which was the case in *Gibbs* v. *Gibbs*, where the only question was, who, in an interpleader suit, was entitled to a sum of 400*l.* I am of opinion, that the taxation in this case must be on the higher scale.

Re STANHOPE'S TRUSTS.

July 4.

A testator, having five daughters, gave a legacy to one and the residue to the remaining four (by name) "and their issue," but he afterwards directed, that any subsequent born daughters and their issue should be entitled to equal shares with the four daughters. One of the four died without issue in the life of the testator. *Held*, that there was no intestacy, that the daughters took as a class, and that those who survived took absolutely.

Bequest of personalty to four daughters "and their issue." *Held*, that they took absolutely.

THE testator, having five daughters, by his will dated in 1821, bequeathed 20*l.* to his daughter *Susanna*, and he gave his real and personal estate to his wife for her life, and after her decease as follows:—

"In trust to and for the use and benefit of my daughters *Harriet, Maria, Charlotte* and *Amelia, and their issue.* And it is my wish and intention, that if my said dear wife shall have a daughter or daughters by me either born in my lifetime or within due time after my decease, that she or they shall be equally entitled with my said daughters *Harriet, Maria, Charlotte* and *Amelia* in and to the residue of my estate and effects and the dividends and interest thereof. Now I do will and direct, that all and every daughter and daughters that my said wife *Sarah Slott Stanhope* shall have by me, and which shall be born either before my decease or in due time after, and the issue of their body and bodies respectively, shall and may be entitled to equal parts and shares, or an equal part and share, with my said daughters *Harriet, Maria, Charlotte* and *Amelia* of, in and to all the residue and remainder of my estate and effects, whatsoever and wheresoever the same may be, and the dividends, interest and produce thereof, in such and the same manner as if the said daughter or daughters hereafter to be born as aforesaid were now living and named in my said will with my said daughters *Harriet, Maria, Charlotte* and *Amelia*, to be applied share and share alike."

The testator died in 1844, his daughter *Maria* had predeceased

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Re STANHOPE'S TRUSTS.

predeceased him, having died in 1842, without having been married. His next of kin consisted of his four surviving daughters.

The testator's wife died in 1859, and the fund (7,860*l.* £3 per Cent. Reduced) now became divisible. The testator's daughters, *Harriet*, *Charlotte* and *Amelia*, were living and had married, but *Charlotte* alone had issue.

This was a petition by the three daughters for payment.

Mr. *Selwyn* and Mr. *Pemberton*, in support of the petition. Under the gift to the daughters "and their issue" the daughters take absolutely; *Butter* v. *Ommaney* (*a*). "Issue" is used as a word of limitation; *Martin* v. *Swannell* (*b*).

Secondly. The gift is to the daughters as a class; it is a gift to all the daughters except *Susanna*, and those who survived the testator and constitute the class alone take. It is not the less a class because some of the persons composing it are mentioned by name; *Porter* v. *Fox* (*c*).

There is, therefore, no lapse or intestacy as to the share of *Maria*.

Mr. *Surrage*, for the children of *Charlotte*. Some effect must be given to the word "issue." Some interest is clearly given to the issue, and the children, therefore, take either in remainder or concurrently with their

(*a*) 4 *Russ.* 70.
(*b*) 2 *Beav.* 249.
(*c*) 6 *Sim.* 491.

their parents. *Ward* v. *Grey* (*a*); *Crockett* v. *Crockett* (*b*) were referred to.

Mr. *Pearson*, for *Susanna*, contended that the gift was to the four daughters individually, as tenants in common; their shares being subject to a diminution by the birth of others. That the daughters, being named, could not take as a class, and that therefore there was an intestacy as regarded the share of *Maria*.

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I think this a gift to a class, though in my opinion it is not a very clear case. If it had been a gift in trust for these four daughters "*Harriet*, *Maria*, *Charlotte* and *Amelia*, by name, and their issue," and it had stopped there, I should have been clearly of opinion that it was not given to a class. Stopping there it is a gift to four persons, and if any had died in the life of the testator without issue, there would have been a lapse of her share, which would have gone to the testator's next of kin. But here the testator directs that every other daughter his wife might have should be entitled to an equal share with the four daughters. There can be no question that all the daughters to be born are to participate, and, therefore, it is a gift to a class. He gives to four persons and all other daughters thereafter to be born, share and share alike; this, I think, is a gift to a class which consists of the four persons named and of all other daughters thereafter to be born.

A person may make a bequest to a class, as to the daughters of *A.* and the daughters of *B.*, and he may add any other person to them making together one class, and that is what is done here, and only those daughters

(*a*) 26 *Beav.* 485. (*b*) 2 *Phill.* 553.

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daughters who survived testator take vested interests. It is not a question of taking as tenants in common or joint-tenants, but whether they take as tenants in common or as joint-tenants, they take nothing unless they survive the testator. I think, therefore, that *Maria* only took as one of a class.

The remaining question is, as to the effect of the word "issue," and I think that is concluded by *Butter* v. *Ommaney* (*a*). The issue here were meant to take by substitution for their parents, and if a parent had died her issue would have taken by substitution. So if subsequent daughters had been born and died in the life of the testator, their issue would have taken by substitution. I am of opinion that there is no intestacy, that the fund is divisible into thirds, and that each daughter takes a third.

HARTLAND *v.* MURRELL.

July 6.

When a testator devises his real estate to his executors and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it.

JAMES COOKE, by his will, dated in 1839, first directed all his just debts and funeral and testamentary charges and expenses to be fully paid and satisfied by his executors, thereinafter named, and after bequeathing legacies to his children, he devised to three trustees (whom he also appointed his executors) all his estate, real or personal, upon trust to permit his wife to receive the rents of the real estate during her life, and immediately after her decease upon trust to sell his real estate; and with all convenient speed after his decease to collect, call in and convert the whole of his personal estate into money, and from and out of the moneys to arise therefrom to pay all his just *debts* and funeral and testamentary

(*a*) 4 *Russ.* 70.

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testamentary charges, and also the said several legacies, and invest the residue and pay the income unto his said wife during her life, and after her decease the testator gave the produce of the real and the residue of his personal estate to his children. He appointed the three trustees to be executors of his will.

The testator died in 1842.

After the testator's death his trustees and executors borrowed from the *Gloucestershire Banking Company* divers sums of money, for the purpose of paying the testator's debts and expenses incurred by them in the execution of the trusts of his said will, and as a security for the repayment of such advances they deposited with the banking company the title deeds and writings relating to testator's real and personal estate, and on the 27th of *May*, 1853, they conveyed the real estate to the banking company by way of mortgage for securing the repayment of 3,920*l.*

This suit was instituted by the banking company, by their public officers, to realise their security.

Mr. *C. Barber* for the Plaintiffs.

Mr. *Bovill* for the executors.

Mr. *Goren* for the widow and some of the children, and Mr. *W. Terrell* for another child, argued, first, that the banking company was not justified in taking a mortgage of the trust estate, without having some proof of the necessity of raising the money advanced for the purposes of the will. Secondly, that the debts were not charged on the real estate devised to the trustees, for they took no beneficial interest in it, but held it on specific trusts for other persons.

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The following cases were cited:—*Harris* v. *Watkins* (*a*); *Symons* v. *James* (*b*); *Henvell* v. *Whitaker* (*c*); *Jarman on Wills* (*d*); and see *Powell* v. *Robins* (*e*); *Dormay* v. *Borradaile* (*f*).

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The banking company was justified in taking the word of the executors, and if they raised the money improperly, it is a question to be determined between them and their *cestuis que trust.*

The other question is, whether on this will there is a charge of debts on the real estate, and I am of opinion that when a testator devises all his real estate to his executors and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it.

(*a*) 1 *Kay*, 438.
(*b*) 2 *Younge & C.* (*C. C.*), 301.
(*c*) 3 *Russ.* 343.
(*d*) *Vol.* 2, *pp.* 502, 508 (*2nd edit.*)
(*e*) 7 *Ves.* 209.
(*f*) 10 *Beav.* 263.

SHEFFIELD *v.* KENNETT.

June 15, 16, 25.

Bequest of 4,000*l.* to *A.* for life, and afterwards, if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one, and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share" and a gift over, if the daughter should "have" no child who should arrive at twenty-one. *Held*, by the *Master of the Rolls* and *Lords Justices* on appeal, that a daughter of *A.*, who attained twenty-one and married, but died in the life of *A.*, took no share.

DR. *KENNETT* died in 1782, having, by his will, bequeathed 4,000*l.* to his daughter *Sarah Ann* for life, and afterwards upon the following trusts:— "And from and immediately after the decease of my said daughter, if she shall *leave* any child or children, upon trust to divide the said sum of 4,000*l.* equally amongst all *such* children, to be payable and become vested interests in such children respectively at their respective ages of twenty-one years; and in case there shall be only one such child who shall live to attain the age of twenty-one years, then to pay the said sum of 4,000*l.* unto such only child, upon his or her arriving at that age."

And until the said child or children of my daughter shall arrive at that age, I direct my trustees to apply the interest of the 4,000*l.* "towards the maintenance and education of all the said children of my said daughter equally, and in case there shall be only one child of my said daughter, then towards the maintenance and education of such only child." And I hereby empower my trustees (with the consent of my said daughter *Sarah Ann* during her life) to apply any part of the 4,000*l.* towards the advancement in the world of any son, or for a marriage portion of any daughter of my said daughter, "not exceeding for any such child or children such presumptive share which he, she or they may be entitled to at the time of such advancement."

And

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And in case my said daughter *Sarah Ann shall have* no child or children who shall arrive at the said age of twenty-one years, then upon trust, as his daughter should appoint by will, and, in default, for her executors and administrators.

The testator's daughter had six children, who attained twenty-one, and she died in 1858.

One of her children, *Margaretta Fuller*, who attained twenty-one, and married, died in 1852, in the life of her mother.

This was a petition for dividing the fund into fifths, to the exclusion of the parties interested under the settlement of *Margaretta Fuller*.

Mr. *Pownall*, in support of the petition, argued, that the fund was divisible between those children only whom the testator's daughter should "leave" surviving her.

Mr. *C. Roupell* for the parties claiming under *Margaretta Fuller*, argued, that all the children who attained twenty-one took vested interests. He cited *Ex parte Hooper* (*a*); *Kennedy* v. *Sedgwick* (*b*); *Maitland* v. *Chalie* (*c*).

Mr. *Beck* cited *Bythesea* v. *Bythesea* (*d*).

June 16. *The* MASTER *of the* ROLLS held that the fund was divisible into fifths, and that the representatives of *Margaretta* were excluded.

(*a*) 1 *Drew.* 264.
(*b*) 3 *Kay & J.* 540.
(*c*) 6 *Madd.* 243.
(*d*) 17 *Jur.* 645; 23 *L. J., Ch.* 1004.

NOTE.—Affirmed by the *Lords Justices* on appeal, *July* 18, 1859.

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CLIFFORD *v.* ARUNDELL.

June 8, 9.

Trustees, who had a power to sell and mortgage and manage and receive the rents of an estate, were directed to pay a life annuity, out of the rents or any other moneys held by them upon the trusts. *Held*, that "other moneys" referred to those *ejusdem generis*, and that the annuity was payable out of income only and not out of capital.

Under a trust, by sale or mortgage, of real estate, to pay, first, personal debts, and secondly, the mortgages on the estate, with a direction to pay an annuity to *A.* until the mortgages should be paid off. *Held*, that the annuity was payable until both the personal debts and mortgages had been satisfied.

THE Plaintiff *Chas. T. Clifford* and his son *Henry Wm. Clifford* were entitled to a real estate, which was subject to three large mortgages of 50,000*l.*, 20,000*l.* and 10,000*l.* The Plaintiff, with his son (as surety) was also considerably indebted.

By an indenture, made in 1849, between the Plaintiff *Charles T. Clifford* of the first part, his son, *Henry W. Clifford* (the Defendant) of the second part, and two trustees of the third part, the Plaintiff and his son conveyed the real estate and other property to the trustees, upon trust, as they should think fit, by absolute sale of, or by demising or mortgaging, or by transferring or directing the transfer of any existing mortgages, and charging the hereditaments, or by any other ways or means whatsoever which to them should appear expedient, to raise all such sums of money as they should think expedient for the purpose of fully performing the trusts and purposes thereinafter declared, and should stand possessed of the moneys to arise therefrom upon the trusts thereinafter mentioned. They were also to manage the property and receive the rents and income upon the trusts after mentioned; that is, "upon trust that the trustees do and shall apply and dispose of a competent part of the *moneys to be raised or received* as aforesaid, in or towards payment, satisfaction and discharge of the several debts or sums mentioned" in the fourth schedule thereto (which were debts amounting to about 11,734*l.* due from the Plaintiff *Charles T. Clifford* and his son), and interest. It then proceeded

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in these words:—and "do and shall, by, with and out of the *moneys aforesaid* or any of them" redeem, pay off, satisfy and discharge these sums of 50,000*l.*, 20,000*l.* and 10,000*l.*, respectively secured by mortgages of the estates, and all interest and all such moneys as should be borrowed by the trustees. And subject and without prejudice as aforesaid, upon trust *until the mortgages should be paid off*, "by, with and out of the rents and profits of the said manors and hereditaments, and the said assigned dividends, interest and income, or any of them, or *any other moneys* in their or his hands," to keep down the interest on the three mortgages. And out of the rents, proceeds and profits of the said manors and hereditaments, or such part thereof as shall from time to time remain unsold, to pay the salaries of bailiffs, &c., and the taxes and out-goings, and keep up certain life policies. And subject to and after full performance of the trusts aforesaid, do and shall, from time to time, yearly and every year, during the life of the said *Charles Thomas Clifford*, or until such time or period as aforesaid, by, with and out of the said rents, issues and profits of the said manors and other hereditaments hereby appointed, and the said dividends, interest and income hereinbefore assigned, *or any other moneys held by them or him upon the trusts of these presents*, raise, levy and pay unto the said *Charles Thomas Clifford* one annuity or yearly sum of 600*l.* And in the next place, "by, with and out of the said moneys, rents, profits and income, or any of them, levy, raise and pay unto *Henry William Clifford*" an annuity of 100*l.*, and keep on foot certain policies, and pay the surplus "income as shall remain after or not applied towards answering the trusts and purposes aforesaid" to the Plaintiff for life; and the unsold hereditaments and premises were to be held in trust for his son absolutely.

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The trustees accordingly sold the greater part of the hereditaments, and applied the proceeds, in the first place, in payment of three mortgages. On the 24th of *June*, 1854, the mortgages were fully paid off, but the debts in the fourth schedule then remained unpaid.

The trustees refused, from *June*, 1854, to continue to pay the annuity of 600*l.* a year to the Plaintiff, on the ground that as all the mortgages on the estate had been paid, the annuity to the Plaintiff thereupon ceased to be payable.

The Plaintiff filed his bill, praying a declaration that, according to the construction of the indenture, the annual sum of 600*l.* thereby limited to the Plaintiff had continued and would continue payable to the Plaintiff, during his life, or until the whole, not only of the mortgage debts and interest but also of the bond and other debts and interest properly payable under the trusts of the indenture, should have been fully paid and satisfied; and that such annual sum of 600*l.* was raisable out of the *corpus* of the said hereditaments.

At the hearing of the cause it was stated, that the last of the debts in the fourth schedule had been paid off in *May*, 1859, after the filing of the bill.

Mr. *R. Palmer* and Mr. *W. H. G. Bagshawe*, for the Plaintiff, contended that the 600*l.* a year was still payable, and that, as the mortgages were to be paid after scheduled debts, the trustees could not, by inverting the order of the payments, and by paying the mortgages first, accelerate the cesser of the Plaintiff's annuity of 600*l.* a year.

Secondly, that the annuity was payable, not only out of

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of income, but expressly out of "any other money held" by the trustees, and that therefore the *corpus* was liable.

Mr. *Lloyd* and Mr. *Ellison*, and Mr. *Selwyn* and Mr. *Buggalay*, for the Defendants, argued that the duration of the annuity was to be "until such time or period as aforesaid," that is, "until the mortgages should be paid off," and that its duration had no connection with the payment off of the personal debts of the Plaintiff. Secondly, that the annuity was a charge merely on the income, and must fail on a deficiency of that fund.

The MASTER *of the* ROLLS held that the 600*l.* a year continued payable until the whole of the scheduled debts, as well as the mortgages, had been paid. He reserved the other point.

The MASTER *of the* ROLLS.

June 9. Upon reading this deed, I retain the opinion which I formed during the argument. I think that the clause in question only refers to the income. It is true that the words "other moneys" are used in the greater part of these cases, but they appear to me to be words *ejusdem generis;* they follow immediately after the words "rents, issues and profits," and "dividends, interest and income" of the property. The debts are to be paid off out of the sums to be raised by sale or mortgage. Then there is a direction, "by, with and out of the rents and profits of the said manors and hereditaments, and the said assigned dividends, interest and income, or any of them, or any other moneys in their or his hands," to keep down the interest on the mortgages. That is a very usual direction, and it appears to me that the words "other

"other moneys" mean other moneys of the like description as the rents, profits, dividends, interest and income, which undoubtedly may be fines and small things in the nature of income, which are not exactly rents and profits that periodically fall in.

It is true the objection which is raised to this construction is, that there are two cases in which the words "other moneys" are not used in addition, and on this the principal argument is founded; but it appears to me that these words are not, for an obvious reason, used in these cases. For instance, the next case is this, "to pay salaries, wages and other allowances made," that is, out of "the rents, issues and profits of the manors and hereditaments, and such parts as shall from time to time remain unsold." I think this merely means that no part of the life income shall contribute towards the expenses of management of the real estate except that arising from the particular part to be managed. That is the reason for the difference in the expression.

I am of opinion, that the whole scope of the deed was to apply the income in this particular manner, viz., in payment of those various sums stated, and that was to be done down to the time when the whole of the property was sold, and the whole debts and mortgages were paid off; and then, the residue being ascertained, the income of it was to paid to the father for life and afterwards to the son. In my opinion that is the effect of this deed.

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Re THE HUNTINGDON MUNICIPAL CHARITIES.

June 25.

The master of a charitable foundation was appointed by the presentation of a municipal corporation and institution by the bishop, who was the visitor. No part of the charity property was vested in the corporation. *Held*, that the case was within the 71st section of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76) and trustees of such right were appointed under it.

THE question was, whether the right of the Corporation of *Huntingdon* to appoint the master of *St. John's Hospital, Huntingdon*, was within the 71st section of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76) (*a*).

The hospital was founded in the reign of *Hen.* 2; the endowment was missing from the records of the Exchequer; but from an inquiry in 1570, it appeared, that the hospital was founded for the maintenance and relief of poor people and the support of a free grammar school, at the costs and charges of the master of the hospital for the time being.

No part of the charity property was vested in the corporation. Under a decree made in 1820, in a suit of the *Attorney-General* v. *The Corporation of Huntingdon*, the master had reported that the appointment of the master was and ought to be by presentation of the Corporation of *Huntingdon*, as patrons of the hospital, and institution by the Bishop of *Lincoln*, the visitor.

And he found, upon consideration of the several matters in his report certified, that the constitution of the hospital was or was to the effect following:—"The hospital was a corporation sole, styled *the Master of the Hospital*

(*a*) Set out *post*, p. 217.

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Hospital of St. John the Baptist in Huntingdon, who was in corporeal possession of his office, by virtue of institution by the Bishop of *Lincoln*, upon the presentation of the mayor, aldermen and burgesses of the Borough of *Huntingdon*, as patrons of the hospital, and after institution, the legal estate of certain lands and tenements, with which the said hospital was anciently endowed, became vested in him, and out of the rents and profits of the lands and tenements, it was the duty of the master of the hospital to maintain poor persons of the borough, and poor travellers, and also a master of a grammar school and that of the hospital. The Bishop of *Lincoln* was visitor."

On the 31st of *July*, 1858, made on the hearing of a petition of the Attorney-General, presented both in the matter of the Municipal Corporation Acts, Sir *Samuel Romilly's* Act and the Charitable Trust Acts, 1853, 1855, an inquiry was directed, whether this, amongst other charities, were within the meaning of the 76th section of the Municipal Corporation Act. The Attorney-General contended that this was a municipal charity within the act, and the corporation insisted on the contrary, and the point was now argued in Court.

Mr. *T. H. Terrell*, for the Attorney-General, argued that it had been decided by the authorities that a case like the present was within the act. He cited *In re St. John's Hospital* (*a*); *The Grantham Charities* (*b*); *Shrewsbury Case* (*c*).

Mr. *Bevir*, for the Corporation of *Huntingdon*, contended that this case was not within the act, that no hereditaments

(*a*) 3 *M. & G.* 235.
(*b*) 26 *L. T.* 302.
(*c*) 1 *Myl. & Cr.* 632.

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hereditaments or personal estate was vested in the corporation, but simply a right of nominating to the bishop, whom he might or might not institute as master, and that it was not a complete right of presentation. He argued that the case was governed by the *Attorney-General* v. *Newbury Corporation* (*a*); and he also cited the *Oxford Charities* (*b*); and see *Attorney-General* v. *The Mayor, &c. of Exeter* (*c*); *Attorney-General* v. *Corporation of Ludlow* (*d*).

The MASTER *of the* ROLLS.

I have no doubt that this case comes within the decisions cited, but it must have been a question of very considerable doubt originally, whether it came within the 71st section, because the words of that section are very peculiar. It refers only to the cases of corporations seised or possessed of hereditaments and personal estate in trust for charities. Lord *Cottenham*, however, in the *Shrewsbury School Case* (*e*) held, that the right to present to an advowson vested in a municipal corporation was within the act, and that it passed and vested in charitable trustees appointed under that act. I cannot distinguish this from the right of presenting to a living. In this case the corporation presents and the bishop institutes, and though there is no evidence how the original right was acquired by the corporation, yet it has been exercised from time immemorial, and whenever they nominate a master to the bishop, he appoints him, assuming him to be a proper person. There appears to me to be no difference between this and an advowson; in both cases, a fit person must be presented, and a mandamus would issue if the bishop refused to admit a fit person so nominated. The observation

(*a*) 1 *C. P. Cooper*, 72.
(*b*) 3 *Myl. & Cr.* 239.
(*c*) 2 *De G., M. & G.* 507.
(*d*) 2 *Phill.* 685.
(*e*) 1 *Myl. & Craig*, 632.

observation of Lord *Truro*, in the *St. John's Hospital* case, is clear on the subject, that when the right of presentation is vested in a municipal corporation as ancillary to the charitable purpose, and for the sole purpose of promoting its due administration, it comes within the 71st section.

I am of opinion that this case comes within that 71st section, and that the right of nomination must be vested in trustees to be appointed under the act.

NOTE.—The 5 & 6 *Will.* 4, c. 76, s. 71, is as follows:—"And whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate, in trust, in whole or in part for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund, be it enacted, that in every borough in which the body corporate, or any one or more of the members of such body corporate in his or their corporate capacity, now stands or stand solely or together with any person or persons elected solely by such body corporate, or solely by any particular member, class or description of members of such body corporate, seised or possessed, for any estate or interest whatsoever, of any hereditaments or any sums of money, chattels, securities for money or any other personal estate whatsoever, in whole or in part in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest and title, and all the powers of such body corporate (or of such member or members of such body corporate) in respect of the said uses and trusts shall continue in the persons who, at the time of the passing of this act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which, before the passing of this act, there were such trustees until the 1st of August, 1836, or until Parliament shall otherwise order, and shall immediately thereupon utterly cease and determine."

"Provided also, that if Parliament shall not otherwise direct on or before the said 1st day of August, 1836, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit, for the administration, subject to such charitable uses or trusts as aforesaid or such trust estate."

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MORRIS *v.* GLYNN.

July 7.

Bequest to a charity of shares in the *Rhymney Iron Company*, which manufactured iron obtained from its own estates, *Held* void under the Statute of Mortmain.

The question whether the shares in a company can be bequeathed to a charity depends on whether the substantial object of the company is or is not a dealing with land, and whether the land held by it is or is not merely ancillary to a trading independent of land.

THIS was a special case presented for the opinion of the Court. The statement of the case was, in substance, as follows:—

Anne Pope, by her will, bequeathed to the school for the indigent blind at *Brighton* fifteen 50*l.* shares in the *Rhymney Iron Company*, and she gave unto the Plaintiff *Greenhill* all the residue of her estate and effects, and she appointed the Plaintiffs *Morris* and *Greenhill* her executors.

The testatrix died in 1857.

The testatrix, at the time of making her said will and of her death, possessed fifteen shares in the *Rhymney Iron Company*, which was a partnership or association of iron-masters, formed under the provisions of a deed made on the 14th day of *November*, 1837, between the several persons parties thereto of the first and second parts. And thereby, after reciting that the parties thereto had agreed to form a joint stock company for carrying on the business of an iron-master at the *Rhymney Iron Works*, and had, for that purpose, agreed to raise a capital of 500,000*l.* in 10,000 shares of 50*l.* each, and to enter into the covenants thereinafter contained; and after reciting the payment of six several sums of 5*l.* per share, and that the parties thereto had purchased, out of the capital so partly formed, the freehold estates called *Rhymney* estates, and also purchased leasehold estates, and had also taken on lease from the Marquis of *Bute* certain lands, mines and other property, lately called the *Bute Iron Works*, together with the iron works and

and all the said properties and the stock and fixtures belonging thereto, subject to the payment of 40,000*l.* (part of the purchase-money) secured on the freehold estate, and that the freehold estate had accordingly been assured to the mortgagee, subject to redemption, and that the leasehold estates had been assigned and demised, and the stock and fixtures delivered to the trustees, *it was witnessed*, that the said parties thereto of the first and second parts mutually covenanted:—

1. To remain associated together in partnership, as a joint stock company, for the purpose of carrying on the usual business of iron-masters, at the *Rhymney Iron Works*, and of the colliery and coal trade, under the firm of the "*Rhymney Iron Company*," until the same should, under the provisions thereinafter for that purpose contained, be dissolved.

2. That the company's affairs should be conducted under the superintendence and direction of a board of directors.

8. That the board might, for the purposes of the company, from time to time purchase and take a letting of any lands, buildings, wharfs, vessels and other fixed and moveable property, and also cause buildings to be erected on the property of the company or property which the company might take on lease, and should cause all purchases of property in the company's behalf to be completed in the names of the trustees thereof, and might, from time to time, sell the company's property for the time being not necessary, in the opinion of the board, for carrying on the business thereof, or let the same on lease, and might, for the purposes of the company, from time to time mortgage any of the property.

12. That the board should, from time to time, cause a proper deed to be executed by every trustee of the company,

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pany, previously to his entering on the execution of the trust to be reposed in him, for the due execution of the same, and for effecting such conversions of the company's property, as should be necessary *for making the shares in the capital thereof transmissible as personalty*, and also by every person becoming a proprietor, &c.

24. That a general meeting might resolve on a dissolution of the company, and that the directors should take the necessary measures for carrying the same into effect, and should make provisions for converting the company's property into money, and for satisfying all the existing liabilities of the company, and for distributing the surplus (if any) of the money produced by such conversion and otherwise, which might remain after satisfying such liabilities, among the proprietors of the company.

27. That shares in the company's capital should respectively devolve, on the death of the respective proprietors thereof for the time being, to their respective personal representatives as their respective *personal estates.*

It appeared that the trustees executed a deed of trust, whereby they declared that they would stand possessed of and interested in the real estate conveyed to them, in trust, as the property and for the purposes of the *Rhymney Iron Company.*

By an act of the 4th and 5th *Vict.* c. 90, the company were empowered to sue and be sued in the name of the secretary or any director, and facilities were given to the trustees of the company to make sale and absolutely dispose of all or any parts of such lands of or belonging to or so held in trust for the company, and which should not be required for the purposes of

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of the company, either by public auction or private contract, but not without the consent of three-fourths in value of the proprietors of the company present at a meeting duly convened. But it was enacted, that nothing therein contained should extend to incorporate the company.

By a report, issued by the directors of the company to the proprietors in *November*, 1858, it was stated, that the manufacture account, for the year previous to the 30th *June*, 1858, produced 40,375*l.* 16*s.* 10*d.*; the stores profit on sales 388*l.* 16*s.*; the house costs 512*l.* 2*s.* 7*d.*; the rental of the estates of the company at *Rhymney*, 3,345*l.* 19*s.* 5*d.*; of those at *Beaufort*, 196*l.* 13*s.* 1*d.*; of those at *Bute*, 539*l.* 6*s.* 3*d.*; of those at *Pont Lollyn*, 92*l.* 0*s.* 3*d.*, and that the profits derived from a brewery belonging to the company were 3,456*l.* 7*s.* 6*d.*, and from a farm also belonging to the company, 252*l.* 18*s.* 9*d.*

The estates of the company at *Rymney*, *Beaufort*, *Bute* and *Pont Lollyn* consisted of freehold and also leasehold lands vested in the trustees of the company, and held by them upon the trusts declared. The rental mentioned in the above report was derived from land and mines; part of the estate was occupied by persons in the employ of the company, and by tradesmen, private occupants and other persons not in the employ of the company.

The shares of the company were transferable by a deed purporting to "assign" the particular shares, with all benefits, &c. attending the same, to the assignee, "his executors, administrators and assigns."

The company had never been registered under the provisions

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provisions of any Act of Parliament, or in any other manner, and had never been incorporated.

Under these circumstances, the Plaintiffs insisted that the bequest of the fifteen shares in the *Rhymney Iron Company* to the school for the indigent blind at *Brighton* was not a legal bequest, having regard to the provision in the Act of Parliament 9 *Geo.* 2, c. 36. The Defendant, on the other hand, insisted that such bequest was legal.

The question submitted to the Court was, whether the bequest was or was not a legal bequest, having regard to the provisions of the Mortmain Act.

Mr. *Swanston*, jun., for the Plaintiffs, relied on 9 *Geo.* 2, c. 36; *Ware* v. *Cumberlege* (*a*); *Edwards* v. *Hall* (*b*); *Walker* v. *Milne* (*c*).

Mr. *Lloyd* and Mr. *Renshaw* for the charity, relied on *Myers* v. *Perigal* (*d*); *Hayter* v. *Tucker* (*e*); *Watson* v. *Spratley* (*f*).

The MASTER *of the* ROLLS.

I will state the grounds on which I entertain the opinion, that a bequest to a charity of these shares is obnoxious to the Statute of Mortmain.

It is very difficult to reconcile the old and the modern cases on the subject, and one great difficulty arises from taking detached passages from the judgment of the judges,

(*a*) 20 *Beav.* 503.
(*b*) 6 *De G., M. & G.* 92.
(*c*) 11 *Beav.* 507.
(*d*) 2 *De G., M. & G.* 599; 11 *C. B. Rep.* 90.
(*e*) 4 *Kay & J.* 245.
(*f*) 10 *Exch. Rep.* 222.

judges, which refer only to the particular case before them, and then applying them to all cases generally.

I think the distinction in these cases is this:—It is necessary to ascertain whether the object of the partnership is a dealing with the land itself, or whether its object is a dealing with some other matters, to accomplish which land is held by it but merely as an accessory to that other purpose. In the latter case, I think that a bequest of shares to charity is not obnoxious to the Statute of Mortmain, but that in the former case it is.

The third clause of the statute makes void gifts of land to a charity, or "of any estate or interest therein," and the only question is, whether the person who makes this charitable bequest is disposing of "any estate or interest in land." I will illustrate my meaning by referring to *Myers* v. *Perigal* (*a*), which I am not only bound to follow, but in which I fully concur. It was the case of a banking company, their profits were made from receiving deposits of money and making profits from them, which they divided amongst the shareholders. The object of the company had nothing to do with land, and it is impossible to conceive anything having less reference to land than the mere taking deposits of money, making profits on them and dividing them. But, at the same time, it was necessary for the company to have a place to receive the deposits, that is an office, and therefore to that extent it had an interest in land, but still the trading concern had as little reference to land as one can conceive. It is true that a security might be taken from a customer, and it might be on land, but that could made no alteration. If it were otherwise, it would follow, that no share of any partnership

(*a*) 2 *De Gex, M. & G.* 599.

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ship could be bequeathed to a charity, for you cannot mention a trade which does not require an office or possess some interest in land. It is also settled that it is a matter of indifference whether the company be an incorporated or an unincorporated company; and if it be a joint-stock company it is a matter of indifference whether it consist of 1,000 shares, of fifty or of two. It is equally a partnership, and the terms of the partnership must regulate the rights of the partners. If two persons enter into partnership as brewers, and agree, that in case of a dissolution, the whole concern shall be sold, and that neither partner shall have any right to land, it might become necessary that, for the purposes of their trade, they should possess a large number of public houses, and they might become owners as partners of such houses to a large extent. In such a case, could one partner bequeath his interest in the brewery to a charity? Would it not follow, notwithstanding the partnership deed, that none of the public houses, held for the purpose of selling beer, would pass to the charity? The debts due to the concern might go to the charity, but one difficulty would be, that a division must be made of the real and personal estate in the concern, and it is scarcely possible in a partnership, consisting of property of various kinds and description, to ascertain from what sources every part of the profits was derived. If that be so in the case of a brewery, would it be less so in the case of a mine? If two persons enter into a partnership in mines, is it not an interest in land, a partnership for making profits of part of the land itself, which, it is true, requires both care and labor to make profitable. In some cases it has been held, that the shareholders have no interest whatever in the land of the company, that being part of their contract, and if they have no interest in the land, they have none to dispose of; they have in such cases no interest, except

except in the profits after they have been realised, and no interest whatever in the land. But this is not so here: it is impossible to say that the owners of iron works have not an interest in land.

The directors' report of *November* last states this—[*see ante, p.* 221].

It is said truly that it is agreed that all the property of the company should be treated as personal estate between the partners, and that if a dissolution should take place, the whole would be sold and the money divided; but could that make it less obnoxious to the statute if it were a partnership between two persons? It cannot be affected by the circumstance that it is a partnership of three or four, or any other greater number, till you get to 1,000, as in a joint-stock company?

This is an interest in land and in the profits derived from land. These persons are united together for the purpose of working mines, and of dividing the profits to be derived from the land itself; and it is quite different from an ordinary trading company. If it were a company established for the purpose of acquiring land, and dividing it or letting it out, would not that be an interest in land? Again, if it had been a company to farm an estate and divide the profits, would that be different from letting it to tenants and dividing the rents? Nor in my opinion does a difference exist for this purpose between a company established for the sale of iron ore to manufacturers and one established for the purpose of raising that ore, manufacturing it themselves and selling it in its manufactured state.

It would introduce a rule which the Court could not safely follow, if it were held, that the shares of a com-

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pany established for letting land would be within the Mortmain Act, but that one whose object was to cultivate the land would not. Or if it were decided, that where a company sells crude iron ore, a bequest of its shares to a charity would be obnoxious to the statute, but if the company itself manufactures the iron it would not.

The only question is, whether the substantial nature and object of this company is a dealing with the land for the purpose of making profits out of it. If it be, then, in my opinion, this bequest is obnoxious to the statute, but if the holding of land be only ancillary to an ordinary trading purpose, then it is not.

I think this comes within the first class, and I will answer the case accordingly.

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July 7.

The Plaintiff acted as the land agent and house steward of the testator, but he resided out of the house:—*Held*, that he was entitled, under a bequest "to all my servants and day labourers who shall be in my service at the time of my death one full year's wages."

THE testator Sir *Thomas John Clavering*, by his will dated in 1840, bequeathed certain annuities and legacies in the words following:—

"I give and bequeath the several annuities hereinafter mentioned to the several persons hereinafter named, during their respective lives, or to such one or more of them as may be in my service at the time of my death, that is to say, an annuity of 40*l.* *to my steward Charles Armstrong*, and an annuity of 20*l.* to each of my servants" *T. F.*, *A. S.* and *C. W.* He then gave other annuities to the "servants," and proceeded in these terms:—"I bequeath *to all my servants and day labourers* who shall be in my service at the time of my death

death one full year's wages above what may be then due to them respectively, and I direct the same to be paid to them respectively within six calendar months next after my death."

In a codicil dated in 1843 there was the following clause:—

"I do hereby, in case my wife Dame *Clara Clavering* shall not survive me, but not otherwise, revoke, as far as concerns the annuitants named in my said will or hereinafter named in this codicil, the bequest made by my said will to all my servants and day labourers who shall be in my service at my death, one full year's wages above what then shall be due to them respectively."

The testator died in 1853, leaving his wife surviving.

Charles Armstrong, who was steward to the testator at his death, claimed, by this suit, a legacy of 300*l.* under the bequest of "one full year's wages" to "all my servants and day labourers." It appeared, from the evidence, that in 1831 the Plaintiff was appointed land agent of the testator, who resided about three months at his mansion-house, called *Greencroft*, in *Durham*, at a salary of 300*l.* a year, with a cottage residence on the estate. He gradually became entrusted with the duties of house steward to the testator, and he engaged and dismissed the servants, and had the ordering of all necessaries required in the testator's establishment at *Greencroft*, and made all payments of tradesmen's accounts and servants, and weekly and day labourers' wages. Whilst the testator was travelling in the counties of *Northumberland* or *Durham*, for the purpose of looking over his estates or otherwise, the Plaintiff generally accompanied him and paid the travelling expenses. The Plaintiff was also permitted to devote his unemployed

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unemployed time in acting as land agent to several large neighbouring landed proprietors.

The Plaintiff, when he went to *Greencroft* to see the testator on business, was accustomed to dine at the testator's table and sit and converse with him, and it was said, on behalf of the Defendants, that this was inconsistent with the position of "servant;" but the Plaintiff stated, that he was, on such occasions, treated in a dependent situation, and in the position of a confidential servant or secretary, and that such was the custom of the large landed proprietors in the neighbourhood.

Mr. *R. Palmer* and Mr. *Haig* for the Plaintiff, insisted that the Plaintiff was entitled to a year's salary. They cited *Bulling* v. *Ellice* (*a*).

Mr. *Follett* and Mr. *Hughes*, for the Defendants, the executors, argued that the Plaintiff was in a superior position to that of a servant, and that his claim could not be maintained.

The MASTER *of the* ROLLS, however, declared that the Plaintiff was entitled to 300*l.*, in respect of the bequest to all his servants who should be in the testator's service at his death of one full year's wages.

(*a*) 9 *Jurist*, 936.

NOTE.—*See Ogle* v. *Morgan*, 1 *De Gex, M. & G.* 359; *Blackwell* v. *Pannant*, 9 *Hare*, 551.

PEARSON *v.* THE AMICABLE ASSURANCE OFFICE and Others.

July 8.

Effect given to a voluntary assignment of a policy of assurance containing an irrevocable power of attorney.

ON the 19th of *June*, 1828, the Reverend *George Townsend*, Prebendary of *Durham*, being desirous of effecting an assurance on his life, in the sum of 3,000*l.* in the corporation of the *Amicable Society*, a policy of that date, under the seal of that corporation, was executed and given to him, whereby he became a member of the corporation on fifteen specified shares; and the society obliged themselves to pay to his executors, administrators or assigns, such a proportion or share of the joint stock or funds of the society as would become due on the death of *George Townsend*, according to the charters and bye-laws of the society.

On the 15th of *September*, 1828, *George Townsend* executed a voluntary settlement of the policy of assurance, and thereby, in consideration of the natural love and affection which he had and bore unto his father and mother and brother and sisters, he assigned the policy of assurance and all benefit and advantage thereof respectively, and all sums and sum of money to be received in respect of the shares in which he had become a member of the society, or otherwise in respect of the policy, to two trustees, upon certain trusts for his father, mother, brothers and sisters. The deed contained the usual irrevocable power of attorney from Mr. *Townsend* to the two trustees. And Mr. *Townsend* thereby covenanted with the trustees to pay "the annual premium of 97*l.* 10*s.* as and when the same should become due and payable, and do all other acts and things

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things necessary to keep the policy of assurance on foot." And also that he and his heirs, &c., at all times thereafter, would "make, do and execute, or cause and procure to be made, done and executed, all and every such further and other acts, deeds, things and assurances, for establishing, corroborating and confirming these presents, and every clause, matter and thing therein contained, and for better enabling the trustees "to perform and execute all the trusts hereby in them reposed," as by the trustees "or any person or persons interested in the premises" should be required.

Mr. *Townsend* died in 1857, having in the meanwhile duly kept up the policy. On his death the amount was claimed by the trustees of the settlement of 1828, but their claim was resisted by the executors, who gave notice to the office not to pay the amount to the trustees. The trustees instituted this suit against the office and the executors, praying a declaration, that under the deed of 1828, the Plaintiffs were entitled to the moneys payable on the policy, and to apply it on the trusts of the deed of 1828.

The assurance company paid the amount into Court, and were dismissed before the hearing, but without prejudice to any question.

Mr. *Selwyn* and Mr. *Hardy* for the Plaintiffs. The case is governed by *Fortescue* v. *Barnett* (*a*), which is precisely in point. Besides, the power of attorney and the covenant for further assurance of themselves render the assignment, though voluntary, binding and effectual. If this be not a perfect voluntary settlement of the policy it would be impossible to make one, however meritorious might be the object.

Mr.

(*a*) 3 *Myl. & K.* 36.

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Mr. *R. Palmer*, Mr. *Speed* and Mr. *Fischer* for the Defendants. It is now settled, by a series of authorities, that this Court will not assist a volunteer under a voluntary settlement in perfecting the gift. Either the gift is perfect or it is not, in the former case the Plaintiffs have no right to come into equity; by taking that step they shew that the settlement is not perfect, and that the aid of this Court is required to make it effectual. It is clear from the remarks on *Fortescue* v. *Barnett*, made by Lord *Cottenham* in *Edwards* v. *Jones* (*a*), that he did not approve altogether of that decision, for he explains it upon its being the usage of the office to recognize the assignee.

The settlor has not done all that was in his power to complete the assignment, he might have declared himself a trustee.

The power of attorney and covenant for further assurance give to the Plaintiffs no right to come into equity. They may make what they can of them at law, but they do not amount to a declaration of trust in favor of mere volunteers.

They cited *Colman* v. *Sarrel* (*b*); *Ex parte Pye* (*c*); *Jefferys* v. *Jefferys* (*d*); *Bridge* v. *Bridge* (*e*); *Weale* v. *Ollive* (*f*); *Beech* v. *Keep* (*g*); *Sewell* v. *Moxey* (*h*); *Antrobus* v. *Smith* (*i*); *Ward* v. *Audland* (*k*); *Dening* v. *Ware* (*l*); *Dillon* v. *Coppin* (*m*); *Wright* v. *Wright* (*n*).

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(*a*) 1 *Myl. & Craig*, 288.
(*b*) 1 *Ves. jun.* 50.
(*c*) 18 *Ves.* 149.
(*d*) *Craig & Ph.* 138.
(*e*) 16 *Beav.* 315.
(*f*) 17 *Beav.* 252.
(*g*) 18 *Beav.* 285.
(*h*) 2 *Sim.* (*N. S.*) 189.
(*i*) 12 *Ves.* 39.
(*k*) 8 *Sim.* 571; 8 *Beav.* 205; 16 *Mees. & W.* 862.
(*l*) 22 *Beav.* 184.
(*m*) 4 *Myl. & Cr.* 647.
(*n*) 2 *Spence's Eq.* 852.

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The MASTER *of the* ROLLS.

When I first heard this deed stated, I entertained no doubt of the right of the Plaintiffs to recover, and the able and elaborate arguments of three learned counsel, and the long citation of authorities, has only confirmed me in the view which I originally entertained.

No person can state too strongly to command my assent the proposition, that if a voluntary assignment of any property is imperfect and incomplete, and the assistance of a Court of Equity is required to give effect to it, this Court will not interfere to perfect the instrument.

I also fully admit, that in these cases there is a distinction between that species of instrument which, by assignment, passes the property, and that which simply operates as a declaration of trust, and I agree that this is not a declaration of trust. The question is, whether this is a complete instrument, or whether it requires the assistance of a Court of Equity for its enforcement? I am of opinion that it is a complete and perfect instrument, and I will state why I think so.

If this were an assignment of the policy for value, and the purchaser had come to this Court for its assistance to render the assignment more complete, what would remain to be done? The assignor would say, "what can I do more than I have already done? If you had told me, out of Court, what further assurance or what further deed or assignment to make this instrument more complete I would have executed it." The question, whether anything remains to be done to complete the assignment of a policy, is exactly the same, whether it arises upon a voluntary instrument or upon one for valuable consideration: whether it be one or the

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the other, the question must be, what is there that the assignee can require the assignor to do to make the instrument more complete. The error in the argument of the Defendants is this:—it is assumed that this is a suit in which an assignor has come here to ask the aid of the Court in making this instrument more complete; but he does nothing of the sort. It is said by the Defendants, "if the Plaintiffs do not require the assistance of this Court, why do they not proceed at law;" but the proceeding suggested in this case would be against the executors; this is not a suit against the executors, it is a suit against the insurance company. The insurance company say, "we are perfectly ready to pay; we do not contest your claim; you want nothing to make the instrument more complete, and we are ready to pay the amount, but we must not remain open to two suits; and, therefore, as the executors raise an adverse claim to the policy, it is not for us to decide whether it is a valid claim or not, and we require the assistance of this Court to prevent our being doubly vexed by two suits, and to determine which of the two claimants is entitled to the money due on the policy. We admit the claim respecting it, there is the money, which we are ready to pay into Court."

The Plaintiffs say our instrument is perfect and complete, we do not ask for any relief against the executors, why should we not have the money? The insurance office is right in paying it to us; it is for the executors to make out their claim. The question is, whether the executors can make out any claim. If the assignment had been made for value, it is clear that the assignor could not have prevented the assignee from using his name in suing the insurance company, if they had resisted the demand, and this Court could not, and would not, have allowed the assignor to say his name should not

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not be made use of. The executors can stand in no better situation than the assignor: this Court would not have prevented the assignee from making use of the name of the assignor, if the insurance company had resisted payment. But here the power of attorney is voluntary; it is irrevocable and in the form usual in all these instruments, and this Court will not allow the grantor to contradict his deed. The Court will not assist a volunteer, but it does not say, on the other hand, that it will assist an assignor in defeating his voluntary deed. The argument has been founded on the supposition that by this suit the trustees are asking the assistance of a Court of Equity, but in truth they come here only to resist the executors of the assignor, who have raised a claim which the assignor was not himself entitled to raise, and which they, standing in his shoes, are not entitled to raise, but which nevertheless makes it impossible for the Plaintiff to receive the money until the claim of the executors is disposed of.

As to the authorities, I think that *Fortescue* v. *Barnett* (*a*) is a stronger case than the present, because there the Plaintiff, claiming under a voluntary assignment of a policy, came to this Court for relief against the assignor himself, who had surrendered the policy to the insurance office and received the money. In *Antrobus* v. *Smith* (*b*) there was nothing but the indorsement on the back of the receipt purporting to assign the shares in a canal; there remained a great deal more to be done to complete the assignment, and there was nothing done entitling any person to sue or recover any money. In *Blakely* v. *Brady* (*c*), Lord *Plunkett* held that an assignment of a note for a sum due to the donor from a third person,

(*a*) 3 *Myl. & K.* 36. (*b*) 12 *Ves.* 39.
(*c*) 2 *Drury & Walsh*, 311.

person, accompanied with the delivery of the note to the donee, and the execution of an irrevocable power of attorney, constituted the donee his attorney for the recovery of the debt, and created the relation of trustee and *cestui que trust*, and he enforced the execution of the trusts against the legal personal representative of the donor. I ought, however, to guard against a misconception of this case. I have stated that I do not consider this case to be a declaration of trust, and Lord *Plunkett* seems to have used the expression *trustee* and *cestui que trust*, but all that I think he meant to have stated was, that the instrument was complete, so far as it was possible by any legal means whatever to make it complete, and that no assistance of a Court of Equity could make it more so; that acting upon that instrument, the assignee in equity had the power to sue at law, unless this Court allowed the assignor to violate the engagements he had solemnly entered into by deed, and unless, at the instance of the assignor, or of his legal personal representative, it prevented the assignee using his name, which I apprehend this Court would not do. In *Dillon* v. *Coppin* (*a*) there was more to be done, and the settlement was incomplete as it stood. The meaning of the word "incomplete" is, that there is something more which ought to be done in order to render the right of the assignee to enforce payment as perfect as the rules of law require it to be. In *Dillon* v. *Coppin* that was not so, but here it is impossible for any counsel to suggest anything more that could have been done by the assignor. So that if it had been an assignment for value, and the assignee had come here to ask the assignor to do something more, the Court would have dismissed the bill with costs, because there was nothing more to be done.

The

(*a*) 4 *Myl. & Cr.* 647.

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PEARSON v. THE AMICABLE ASSURANCE OFFICE and Others.

The result is that the Plaintiff is entitled to a decree, and the executors having made an unfounded claim which they are unable to sustain must pay the costs.

MELLERSH *v.* KEEN.

July 12.

A notice of dissolution given to a lunatic partner is sufficient to put an end to the partnership.

Notice by two partners to a third that "we *shall* dissolve the partnership" on the 31st of *December*, operates as a dissolution on that day.

FROM the month of *June*, 1846, until the 31st day of *December*, 1858, the Plaintiffs *Thomas Mellersh* and *Frederick Mellersh* carried on the business of bankers in co-partnership with the Defendant *William Keen*, pursuant to a verbal arrangement and agreement between them, by which they were to be interested in equal shares in the capital and profits of the concern, but no other agreement was ever made defining the terms of the partnership or fixing its duration.

In the early part of the year 1856, the Defendant had the misfortune to become disordered in his mind and was placed in a lunatic asylum for about five months. In *August*, 1858, the Defendant again became of unsound mind and wholly unable to attend to or take any part in the business. In *September*, 1858, he was again placed in a lunatic asylum where he still remained in the same state.

In consequence of this, the Plaintiffs became desirous to dissolve the partnership, and on the 20th day of *December*, 1858, they served upon the Defendant a notice in writing signed by them, by which they stated, "that on the 31st day of *December* we *shall* dissolve the partnership."

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The notice was handed to the Plaintiff in the asylum, and its purport explained to him.

On the 31st of *December*, 1858, the Plaintiffs, pursuant to the notice, met at the banking house and declared the partnership dissolved, and made entries to that effect in the several books of the said partnership. The Plaintiffs subsequently carried on the business at the old premises held by the firm on a lease at a rack rent, and expiring in *March*, 1861, and the names "*Mellersh & Keen*" were retained on the door.

The Plaintiffs instituted this suit in *March*, 1859, praying a declaration, that the partnership was dissolved on the 31st of *December*, 1858, and that the partnership accounts might be taken.

It appeared that the business had originally been established by the Plaintiff, *Thomas Mellersh*, in 1808, and that the Defendant, on his admittance, had paid no premium. The affidavit of the Plaintiffs stated as follows:—"Prior to the 31st of *December*, 1858, we intimated to the customers, generally, of the partnership between us and the Defendant, that it was our intention to dissolve the partnership on and from that date, and thereupon and from time to time and since that date we have intimated to all the customers that we had dissolved the partnership. Immediately upon our dissolution of the partnership, we took out a fresh licence in our own names as bankers, although the old licence had not expired; we thereupon proceeded to carry on and have ever since carried on business under a new firm, that is, that of "*Thomas Mellersh, Frederick Mellersh & Co.*," and we have carried on such business exclusively

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sively with our own private assets, and with an entire new series of books, and with a new and fresh issue of checks and notes, and we have never, since the 31st day of *December*, in any way made use of the name, style or firm, or credit of the partnership with the Defendant, or any of the cash, moneys, books, bills, notes or assets of the partnership with him, or of his name, for any purpose other than that of winding-up the business thereof."

The evidence on behalf of the Defendant stated, that the good-will of the business was of considerable value, and that the name of "*Mellersh & Keen's Bank*" had been continued to the present time on the door of the bank. The Plaintiffs explained this by saying, that they had retained "the same in consequence only of the house being used for the purpose of winding-up the outstanding business and affairs of the late partnership, and for the information and guidance of persons who had, from time to time, required to transact business with them, in respect of the dealing of the late partnership, there being, at the date of the dissolution, notes of the late partnership in circulation, amounting in the aggregate to between 4,000*l.* and 5,000*l.*, and many outstanding accounts and matters to settle, and they considered, that until such notes and bills had been paid and retired, and the other claims upon the partnership satisfied, they would not be justified in removing the plate from the door."

Mr. *W. Pearson* for the Plaintiffs.

Mr. *Follett* and Mr. *C. Hall* for the Defendant.

The dissolution must take place from the date of the decree

decree and not from the day mentioned in the notice; *Sayer* v. *Bennet* (*a*); *Besch* v. *Frolich* (*b*); *Peacock* v. *Peacock* (*c*); *Kirby* v. *Carr* (*d*); *Anon.* (*e*); for the notice served on the lunatic, while he was not in a state to comprehend it, was altogether inoperative. In *Capper* v. *Dando* (*f*) the Defendant had given a warrant of attorney to secure a retransfer of some stock *on demand*. He afterwards became insane. The Court declined to act on a demand of retransfer made on him while a lunatic. Lord *Denman* said, "the demand must be made on a person capable, and not upon one whose body only can be said to be present. This demand is of no more effect than if addressed to a person asleep. The affairs of the lunatic must be put into the ordinary course."

Secondly. The Defendant is entitled to a share in the good-will of the concern. The business, down to the present time, has been carried on by the Plaintiffs on the leasehold premises belonging to the firm, the lease of which was granted to all the partners, and the name of *Keen* has remained on the door. The "good-will" consists of every advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm; *Churton* v. *Douglas* (*g*); and it belongs to the members of the firm, each of whom is entitled to his share. The Plaintiffs have taken the good-will to themselves, and they must account to the Defendant for his share of it; *Willett* v. *Blanford* (*h*); see 7 & 8 *Vict.* c. 32, ss. 10, 11.

[*The* MASTER *of the* ROLLS. If you sold the good-will

(*a*) 1 *Cox*, 107.
(*b*) 1 *Phillips*, 172.
(*c*) 16 *Ves.* 49.
(*d*) 3 *You. & Coll.* (*Ex.*) 184.
(*e*) 2 *Kay & J.* 441.
(*f*) 2 *Ad. & Ell.* 458.
(*g*) 1 *Johnson*, 174.
(*h*) 1 *Hare*, 253.

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will it would be in the mode adopted in *Cooke* v. *Collingridge* (*a*). There would be nothing to prevent the Plaintiffs carrying on the same business, and the purchaser could not be entitled to prevent it.]

Lastly. The form of the notice is insufficient, it is "that on the 31st day of the present month of *December*, we *shall* dissolve the partnership between you and us." This did not constitute a dissolution, but left something more to be done at a future period.

[*The* MASTER *of the* ROLLS. Assuming the Defendant to have been a sane person, I think this a perfectly good notice, it is "we dissolve it from that day."]

Mr. *Pearson* in reply. I admit that mere insanity does not of itself dissolve a partnership, and that it must be dissolved by some act of the other partners or by the decree of this Court. When the partnership is for a term, it is necessary to come to the Court to be relieved from the express terms of the partnership contract; but where the partnership is at will, it is not even necessary to give a notice, but it may be dissolved by any act inconsistent with the intention to continue carrying on the trade together. A partnership at will is one which endures so long only as the united will of all the partners concur in it, and therefore when the will of one of several partners to discontinue the partnership is expressed, it operates as a dissolution, and no assent or concurrence of the other partners is necessary. Notice of dissolution given to a lunatic is sufficient; it was so expressly held by the Vice-Chancellor of *England* in *Robertson* v. *Lockie* (*b*), where notice of dissolution had been

(*a*) *Collyer on Partnership*, 174; *and see Davies* v. *Hodgson*, 25 *Beav.* 182.

(*b*) 15 *Sim.* 285.

been served on the Defendant while lunatic, and it was held valid.

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I think that this must be treated as being a good and effectual notice to dissolve the partnership. When persons enter into a partnership at will, it must be considered as incidental to that partnership that it is dissoluble on either partner receiving from the other notice of dissolution; and that being the contract, it is exactly the same as if it had been introduced in express words into a written agreement; and if so introduced, then I think the case is like a notice to a tenant to quit, or a notice of the dishonored bill of exchange, or a notice to dissolve at the end of six months, which was the case in *Robertson* v. *Lockie* (*a*), in which case the notice is good, though the party receiving it be lunatic. This, therefore, must be treated as a good notice to dissolve the partnership on the 31st of *December*, 1858.

With regard to the form of the decree, I think it ought to be something to this effect:—Declare the partnership dissolved from the 31st of *December*, 1858, and then let there be an inquiry in chambers what, if anything, was the value of the good-will of the partnership business on the 31st of *December*, 1858, having regard to the circumstance that the Plaintiffs are at liberty to carry on the same business and to issue notes, and that the right of issuing notes would not pass to the purchaser of the good-will. Then an account ought to be taken of all the partnership dealings and transactions, and the Plaintiffs should be charged, in taking that account, with so much of the value of the good-will, on

(*a*) 15 *Sim.* 285.

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on the 31st of *December*, 1858, as belonged to the Defendant. In taking the partnership accounts you must not disturb any settled accounts. There must also be an account of what profits have been realised by the Defendants in the partnership business subsequently to the 31st of *December*, 1858, by the use of the Defendant's capital or property therein subsequent to that time, and the Plaintiffs must be charged with it; and from the same period it must be ascertained what would be proper to be allowed the Plaintiffs in respect of their personal superintendence and management of the business. Those two in point of fact are correlative inquiries, which, in partnerships of this description, I always insert, the one operating against the other. I shall reserve further consideration.

COLE *v.* THE WEST LONDON AND CRYSTAL PALACE RAILWAY COMPANY.

July 4, 5.

A railway company proposed taking a part of the garden attached to a dwelling-house, thereby cutting off the end of the garden and the summer-house:—*Held*, that under the 92nd section of the Lands Clauses Consolidation Act, they were bound to take the whole property.

THE Defendants were authorized to make their railway, by an act intituled "*The West London and Crystal Palace Railway Act*, 1853" (*a*), and the Lands, the Companies and the Railway Clauses Consolidation Acts were incorporated in their act. The act gave them the usual compulsory powers of taking land for the purpose of forming their railway.

The Plaintiff, Mr. *Cole*, was the owner in fee of three dwelling houses, one of which called *Belmont Lodge* was detached, and in the Plaintiff's own occupation. The two others were semi-detached, but adjoined the Plaintiff's house, and were in the occupation of two tenants, Mr. *Mason* and Mrs. *Greenfield*. A curtilage and

(*a*) 16 & 17 *Vict. c. lxxx.*

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and garden, less than half an acre each, were attached to each house, and according to the deposited plan, the railway was to pass through these three gardens.

The railway company gave the Plaintiff notice to treat for the purchase of a part of the three gardens, amounting to about thirteen perches, but they afterwards withdrew their demand, as regarded the garden in the occupation of Mrs. *Greenfield*. The effect of their ultimate requirements would be, as to *Belmont Lodge*, to cut off a piece of the garden attached to it, together with a hot-house, summer-house and other buildings erected therein. As to Mr. *Mason's* house, it would take the end of the garden, and the summer-house at the bottom of the garden, but it was not proposed to take any part of the premises in the occupation of Mrs. *Greenfield*.

The Plaintiff refused to treat for a part of the premises, and he required the Defendants to take the whole of the three houses and premises. He relied on the ninety-second section of the "Lands Clauses Consolidation Act, 1845" (8 & 9 *Vict.* c. 18) which enacts, "that no party shall, at any time, be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

This was resisted by the company, who took possession under the eighty-fifth section, having first made the proper deposit of the amount of the valuation of the part proposed to be taken (900*l.*) and given the bond required by the act.

The Plaintiff instituted this suit against the railway company,

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company, to restrain them from proceeding before a jury to determine the amount of compensation to be paid by the company for the purchase of the portion of the land mentioned in their notice, and from entering or keeping possession of it, and from taking proceedings to acquire part of the property compulsorily, until they should have purchased the whole of the houses and premises.

Mr. *Selwyn* and Mr. *W. Morris* for the Plaintiff, argued, that on the construction of the 92nd clause of the act, and on the reported decisions, the Defendants were bound to take the whole of the property.

Mr. *R. Palmer* and Mr. *Locock Webb*, for the Defendants, argued, that as the company proposed to take no house, but merely a piece of land, they were not bound to purchase the whole of the property in question.

The following cases were cited :—

Lord Grosvenor v. *The Hampstead Junction Railway Company* (*a*); *Sparrow* v. *The Oxford &c. Railway Company* (*b*); *Spackman* v. *The Great Western Railway Company* (*c*); *Barker* v. *The North Staffordshire Railway Company* (*d*); *Dakin* v. *The London and North Western Railway Company* (*e*).

The MASTER *of the* ROLLS (without hearing a reply):—

With respect to Mrs. *Greenfield's* house, as the railway company do not intend to touch it, the Plaintiff cannot

(*a*) 1 *De G. & Jones*, 446.
(*b*) 2 *De G., M. & G.* 94.
(*c*) 1 *Jur.* (*N. S.*) 790.
(*d*) 2 *De G. & Sm.* 55.
(*e*) 3 *De G. & Sm.* 414.

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cannot require them to take it, as to that it is a mere question of damage, which the Plaintiff is entitled to have ascertained in the usual way.

But the case respecting *Belmont Lodge* is very different. The railway cuts off the hot-house, the summer-house, and a portion of the garden, to what extent I do not very well know, but it cuts off several feet. It is evident that the taking of these buildings must seriously prejudice the whole of the rest of the house as a habitation.

In the cases of *Lord Grosvenor* v. *The Hampstead Junction Railway Company* (*a*), the Lords Justices determined that where a railway company requires a portion of a garden attached to a house, they must, under the 92nd section of the Lands Clauses Consolidation Act, be considered as taking what, in a conveyance, would, under the word "house," be deemed a part of the house, and that this would include the whole. They held that the word "house" in the 92nd clause, comprised all that would be included by the word "house" in an ordinary legal instrument; so that, if Mr. *Cole* had granted a house called *Belmont Lodge* to *A. B.*, in consideration of a sum of money, the 92nd section would include all that would pass by such a grant. It is clear that the whole of this garden would have passed by such a grant. This is the only reasonable construction that can be put upon the act, because if it is to be construed strictly, an out-house which is detached from the principal residence would not be included, and though the stables and the whole of the garden were required by a railway company, they could not be compelled to take the house, though the stables and

(*a*) 1 *De G. & Jones*, 446.

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and garden were essential to its enjoyment, because strictly no part of the "house" itself is taken.

The company therefore in the case of *Belmont Lodge* create a very serious injury to it, and must take the whole.

The injury is less in the case of Mr. *Mason's* house, but the railway cuts off the end of the garden, converts it into a triangular form, cuts off the summer-house at the bottom, and takes a small portion of the garden, which is essential to the enjoyment of the house. With respect to those two, therefore, I think the Plaintiff is entitled to a declaration that they are bound to take the whole of those two messuages, and that the value must either be assessed by a jury or by myself in Chambers, unless the parties can agree on the matter.

I must grant an injunction to restrain the Defendants from proceeding before a jury to ascertain the value and damage, confined solely to the portion which they have hitherto taken.

NOTE.—*See Hewson* v. *The South Western Railway Company* (*V. C. Wood*, 16 *May*, 1860); *King* v. *The Wycombe Railway Company* (*M. R.* 5 *March*, 1860).

CASE *v.* THE MIDLAND RAILWAY COMPANY.

Jan. 14, 17.
July 11, 13.

The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it.

Experiments directed to be made by a civil engineer to ascertain the effect of steam navigation on a canal.

Perpetual injunction granted to restrain a canal company from preventing the Plaintiffs using steam power on their canal; the Plaintiffs undertaking not to exceed a speed of three miles an hour.

THE *Ashby-de-la-Zouch Canal* was constructed under an act of the 34 *Geo.* 3, c. xciii. This act, after reciting that the making and maintaining the canal for the passage of boats would open an advantageous communication with divers lime works, mines and collieries, and facilitate the conveyance of articles and tend to "the preservation of public roads and be of great public utility," proceeded to incorporate the canal company and to authorize them to make the canal.

The 113th section of the act was to the effect following:—"That every person shall have free liberty to use the private ways and roads belonging to the company (except the towing paths), for conveying goods to the canal and the wharfs, &c., and also *with boats and other vessels* to navigate, pass upon and use the said canal, cuts or branches and roads respectively, for the purpose of conveying any iron, stone, coals, lime, goods, merchandise, commodities, matters or things whatsoever thereon respectively," and also to use the wharfs for loading and unloading of any goods, "and the towing paths for the hauling and drawing of such boats and vessels," upon payment of the tolls and duties, "and subject always to the rules, orders, bye-laws and regulations which shall from time to time be made by the said company of proprietors, by virtue of the powers herein granted."

The 114th section, empowering the company to make bye-laws,

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bye-laws, was as follows:—"And be it further enacted, that it shall be lawful for the said company of proprietors, from time to time, to make such rules, orders and regulations for or relating to the passing of any locks to be made by virtue of this act, with any boats or other vessels, as they shall think proper," which upon being published as therein mentioned, shall be binding upon and be conformed to by the owners, masters or persons having the care or conduct of such boats or other vessels as aforesaid, upon pain of forfeiting a sum not exceeding 5*l.* nor less than 20*s.* for every default.

The 130th section made the master or owner of every boat or other vessel answerable "for any trespass, damage, spoil or mischief" which should be done by his boat or other vessel to the works in, upon or near to the canal.

Under the powers contained in an act of the 9 & 10 *Vict.* c. cciii, the canal was purchased by and became vested in the Defendants, the *Midland Railway Company*, and by that act (s. xvi) the rights of the public were reserved, and (s. xxxii) the Defendants were thereby required, for ever thereafter, at their own costs and charges, to keep, repair, support and maintain the *Ashby-de-la-Zouch Canal*, and the several railways and works belonging thereto, well and sufficiently repaired, dredged, cleansed and secured, and in good order and condition, for the purposes of the canal, and (s. 33) to preserve the supplies of water to the canal, as amply as they were then and had theretofore been usually maintained, so that the navigation of the canal should, at all times, be kept open and navigable *for all persons desirous to use and navigate the same.*

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The method of hauling canal boats by horses being too expensive to enable persons to compete with railways, the attention of engineers was directed to the application of steam power to the traction of boats on canals, and the result was, that Mr. *Innshaw* invented a canal boat propelled by a pair of small screw-propellers in the stern, which worked in opposite or contrary directions, and were driven by steam power.

The contrary action of the two screw-propellers under water had the effect, as was alleged, of destroying the disturbance of the water created by each, and this prevented all injurious effects to the bank of the canal. These boats might be applied either to the purposes of traction or of carrying a cargo itself, and they had been successfully and advantageously used upon various canals.

The Plaintiffs, who were extensively engaged in the coal trade, were the owners of a boat called "*The Pioneer*" constructed on Mr. *Innshaw's* principles. They were desirous of navigating the *Ashby-de-la-Zouch Canal* with that vessel, but the Defendants, the railway company, positively refused to permit the vessel to enter the canal. It was suggested that the object of the railway company, in doing this, was to increase thereby the carrying trade on their own railway.

The Defendants alleged, that if the Plaintiffs' boat were allowed to navigate the canal it would cause damage and injury to the banks thereof, by means of the wash and surge of the water which it would occasion.

The Plaintiffs however alleged that the surge or wash of the water occasioned by their boat, when navigating

a

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a canal, was considerably less than that occasioned by a canal boat of the ordinary dimensions and descriptions drawn by horses, and that when propelled at a rate of from five to six miles per hour (which was the greatest speed which it was capable of attaining) the surge or wave occasioned by their boat was, by reason of the double action of its screws, quite insignificant and harmless.

In consequence of the obstruction raised by the Defendants to the navigation of the canal by *The Pioneer*, Messrs. *Case* instituted this suit against the *Midland Railway Company*, praying a declaration that the Plaintiffs were entitled to navigate, pass upon and use the canal with "*The Pioneer*," or with any other boat of similar construction, for the purpose of conveying coals or other merchandize thereon, upon paying the tolls and conforming to all bye-laws and regulations lawfully made and published.

The Defendants, by their answer, said, that ever since the construction of the canal, no other mode of traction than by horses had been permitted. They insisted that the steam-boat, if allowed to navigate the canal, "would cause great and irreparable damage and injury to the banks and sides thereof, by means of the wash or surge of the water which it would occasion." They set up a bye-law, made in 1817, in consequence of the damage done to the banks by boats being drawn at a rapid rate. This imposed a penalty of forty shillings on the proprietors of boats, if the horse drawing them upon the canal should be made to travel faster than a walk.

They said "they totally denied the Plaintiffs' right to use or navigate the canal by means of steam-boats, without

without their permission," and insisted that the Plaintiffs' remedy was at law.

The cause now came on upon a motion for a decree, and there was a great mass of conflicting testimony.

Mr. *R. Palmer* and Mr. *William Pearson*, for the Plaintiffs, argued that the acts of parliament gave the public a right of navigating on the canal, and did not limit them to the use of any mode of traction or propulsion. That any mode whatever might therefore be adopted, provided it did no unreasonable damage to the canal and did not impede the navigation of it by other boats. That the evidence shewed that *The Pioneer* would occasion no more damage than the boats drawn, in the old method, by horses.

As to the bye-law, that it was not warranted by the act, and that it was invalid if it interfered with the free use, by the public, of the canal, for the purposes of traffic, but that in fact it did not apply to this case. *The Stourbridge Canal Company* v. *Wheeley* (*a*); *The Kingston-upon-Hull Dock Company* v. *La Marche* (*b*); *Dand* v. *Kingscote* (*c*); *Bishop* v. *North* (*d*); *The Durham and Sunderland Railway Company* v. *Walker* (*e*).

The Solicitor-General (Sir *Hugh Cairns*) and Mr. *Speed*, for the Defendants, contested the Plaintiffs' right upon the act and the evidence. They argued, also, that the bill ought to be retained for a year, with liberty to the Plaintiffs, in the meanwhile, to establish their right at law. They suggested that if the Court entertained any doubt as to the effect of navigating the canal by steam vessels, it might direct experiments to be made,

as

(*a*) 2 *Barn. & Ad.* 792.
(*b*) 8 *Barn. & C.* 42.
(*c*) 6 *Mee. & W.* 174.
(*d*) 11 *Mee. & W.* 418.
(*e*) 2 *Q. B. Rep.* 940, 960.

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as had been done in *Dickenson* v. *The Grand Junction Railway Company* (*a*), where experiments had been made, by order of the Court, to ascertain whether the pumping up water by the Defendants at a well at a distance from the Plaintiffs' paper manufactory affected the ordinary supply of water to their mills.

The MASTER *of the* ROLLS.

My present impression is, that the case must stand over, in order that experiments may be made as to the effect of working the boat on the canal. The most satisfactory mode would be to appoint some engineer of eminence, wholly unconnected with the parties, to make the necessary experiments, and then report to me on the subject.

I am satisfied that if the boat were likely to do such damage to the canal as to imperil its existence, it cannot be used on the canal; but if it should only produce the same damage which it is admitted to be produced by boats drawn by horses, then I think that the Plaintiffs are entitled to use it.

The Plaintiffs might possibly use the steam-boat at such a reduced speed as to produce no damage at all; but if the Court simply declared the Plaintiffs' right to use it on the canal, they might increase the speed so as to produce an amount of damage which the Court would have no means of controlling. The Court might, however, take this course:—It might declare the Plaintiffs' right to use the boat at a rate of speed not exceeding that which did no injury to the canal; this, however, would be vague. I should wish to have the effect of the user of this boat first ascertained.

Ultimately

(*a*) 15 *Beav.* 260; 7 *Exch. Rep.* 282.

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Ultimately an order was made, whereby the following questions were referred to Mr. *William Pole*, a civil engineer:—

What effect the use of the canal by boats or vessels, propelled according to the same principle and method as *The Pioneer*, both with and without other vessels in tow, and at the different rates of speed of which they are capable, will have upon the banks and other works of the canal and the navigation of the Defendants.

Mr. *Pole* accordingly made the necessary experiments, and he certified the result to the Court. He said, that the commencement of the injurious action to the banks took place when the wave began to assume a broken form, as distinguished from a convex shape or wave of translation, and that when a wave of this character, in a marked degree, accompanied continuously the boat, injury to the banks might in time be expected to arise. He distinguished the wave; first, to that due to the passage of the boat, and secondly, that arising from the action of the propelling apparatus itself. He represented that the latter did not, of itself at any speed, give rise to any wave injurious to the banks of the canal. The result of the experiments was as follows:—

Up to a speed of three miles an hour, no wave of any injurious character appeared. Between three and three and-a-half miles an hour, a breaking wave appeared occasionally, in curves and shallows. Above three and a half miles an hour, the breaking wave became more continuous, and took a more marked channel. At four miles an hour, the injurious character of the wave became very decided. At five miles an hour, even in the increased section of the canal near *Meira*, the wave was still more increased, breaking sometimes over the towing

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towing path, and being followed by other waves in succession.

His report concluded as follows:—"My general answer to the question submitted to me by your Honor is, that if confined within certain limits of speed, the use of the canal by such boats or vessels, either with or without other vessels in tow, *will not* have any injurious effect upon the banks or other works of the canal or navigation."

July 11. The case came on for further consideration.

Mr. *R. Palmer* and Mr. *W. Pearson*, for the Plaintiffs.

Sir *H. Cairns* and Mr. *Speed*, for the Defendants.

The MASTER *of the* ROLLS.

July 13. I was desirous, before determining the question of costs, of reading the papers, and having done so, I am of opinion that the whole of the litigation has been caused by the Defendants, the railway company, who positively insisted that no vessel propelled by steam should be allowed to enter the canal on any terms or conditions whatever. I must make a decree against them with costs. The form of it will be this:—Declare the Plaintiffs are at liberty to use the canal with the *Pioneer* or any other boat similarly constructed, provided such vessel be not propelled at a rate exceeding three miles an hour. And the Plaintiffs undertaking not to propel such boats at any greater rate of speed, let the Defendants be perpetually enjoined from preventing, interfering with or obstructing the Plaintiffs navigating the canal with the *Pioneer*, or any other boat similarly constructed.

structed. Order the Defendants to pay the costs of suit, and let the expenses properly occasioned by the employment of Mr. *Pole*, and the persons who were employed to enable him to make his experiments, and properly connected therewith, be costs in the cause. Liberty to apply.

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CASE v. THE MIDLAND RAILWAY COMPANY.

VARLO *v.* FADEN.

July 14, 27.

The provision for payment of debts, excepted from the *Thellusson* Act, is not confined to debts existing at the date of the will or at the death of the testator.

A testator made a bequest of four shares in a newspaper to one for life, but he directed the income, beyond 200*l.* a-year, to "be reserved, as a kind of sinking fund for the protection of those four shares:"—*Held*, that the accumulation was valid beyond twenty-one years from the testator's death, this being a provision for the debts of some "other person or persons" within the exception in the *Thellusson* Act.

A testator gave four shares to his wife. He afterwards said—"Should the four shares be sold, the purchase-money is to be placed in the funds and she is to have the interest thereof during her natural life; but should she not sell the shares, whatever sum may annually accrue from them, beyond 200*l.*, is to be reserved, as a kind of sinking fund for the protection of those four shares in the *Globe* newspaper. At her decease, the whole of the property arising from the shares or from their sale to be divided between *M.* and *L.*" His widow was not an executrix:—*Held*, that the widow had either a power to sell, or a right to call for a sale of the shares. Secondly, that a large fund, which had accumulated from income beyond 200*l.* a-year, and which was not required for the protection of the shares, did not belong to the widow, but formed *corpus*.

LIEUTENANT *James Faden*, being the owner of four shares in the *Globe* newspaper, made his will on the 12th of *August*, 1828, in the following terms:—

"I do hereby leave and bequeath my four shares in the *Globe and Traveller* to my dearly beloved wife, *Christiana Adelaide Faden*, and also my two houses in *Francis Street, Woolwich*, together with the furniture in the one I dwell in, and together with the books, wine and plate which I may possess. The execution of the lease of the two houses has been deferred from my ill health, but there will be no obstacle to her execution of it, and I recommend it to be done without loss of time. This

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This being done, my advice is to part with the house I reside in to government, as a residence for the commandant, or otherwise to let it to an artillery officer of rank; with that view, she should take with her, into the adjoining house, that part of the furniture which may be suitable and sell the remainder. In the event of the house being let, the rent is to go to her, and, in the event of its being sold, the interest of the money arising is to go to her, the purchase-money to be placed in the funds. In the same manner, should the four shares be sold, the purchase-money is to be placed in the funds, and she is also to have the interest thereof during her natural life, but should she not sell the shares, whatever sum may annually accrue from them, above 200*l.*, is to be reserved, as a kind of *sinking fund*, for the protection of those four shares in the *Globe* newspaper. At her decease, the whole of the property arising from the shares or from their sale, as also that arising from both houses or from their sale, is to be divided unequally between Miss *Marianne Varlo* and Miss *Louisa Varlo*, Miss *Marianne Varlo* receiving one-third and Miss *Louisa Varlo* two-thirds, and upon their decease, it is to be divided equally among the other surviving children of Captain *Varlo*. I do hereby name and appoint Captain *George Varlo*, of *Bowater House, Woolwich*, and the Reverend *Anthony Gordon*, of *St. Margaret's, Westminster*, to be my trustees for carrying the above will into effect."

The testator died without issue on the 9th of *September*, 1828, and his will was proved by Captain *Varlo* (the Plaintiff) and Mr. *Gordon*.

At his death, he possessed the four shares in the *Globe* newspaper, which was held by several proprietors, and was divided into sixty-two shares. The rights of the proprietors

proprietors were regulated by a partnership deed dated the 25th *March*, 1826, which was signed and sealed by the testator and the other proprietors, and among other provisions in it contained the following :—

" 12th. That the said co-partners shall and will, every of them, according to their respective shares and interests for the time being of and in the said co-partnership property, contribute, in due time, their due shares or proportions of and to all payments, fines and costs, losses, damages, charges and expenses, which may be incurred by the co-partnership or by any of the co-partners in the conduct or management of the said newspaper, or any article, matter or thing therein contained, or by or in consequence of any bond or bonds, given and to be given, for the due and regular payments of the stamps required for the lawful sale of the said newspaper, and for the duty on advertisements, or otherwise howsoever.

" 16th. That upon the death of any of the co-partners, there shall be no other right or benefit of survivorship than such right of pre-emption as next hereinafter mentioned, nor any other advantage, on that event, had or taken by the surviving partners or by any of them, but the part, share or interest of such deceased partner of and in the said co-partnership property shall vest in and devolve upon his personal representatives" or legatees, provided such executors or administrators or legatees do, within one calendar month, render themselves subject and liable to the performance of the agreements, &c. to which the then surviving co-partners may be subject. And, if required, execute a deed containing covenants with the other partners to observe the agreements, &c. then subsisting with respect to the co-partnership concerns.

" 17th. In case the representatives decline to comply with these conditions, or if any partner should be desi-

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rous of selling, the other proprietors were, in the first instance, to have a right of pre-emption, and in case of their declining to purchase, the vendors might sell to any purchaser, who was bound to execute proper deeds, so as to bind him by the partnership agreements.

The widow, in *October*, 1828, requested the executors, by writing, not to sell any part of the property of her late husband, and she agreed to pay his debts, which she did. The shares were accordingly retained in the manner provided for by the 16th clause of the partnership articles.

The 200*l.* a-year had been paid to the widow out of the income arising from the shares, so long as it was sufficient, and a considerable accumulation had been made from the surplus income, which was invested and accumulated for the purpose of forming the sinking fund directed by the will.

At the expiration of twenty-one years from the testator's death (viz. on the 9th *September*, 1849) the accumulations amounted to 5,059*l.* 12*s.* 9*d.*, £3 *per Centum* Consolidated Bank Annuities, and since that time, the fund had been increased, so that in the month of *January*, 1858, it amounted to 6,538*l.* 16*s.* 7*d.* like annuities.

The *Globe* shares had deteriorated in value, and the annual proceeds thereof became, in 1847, insufficient to pay the 200*l.* a-year to the widow, and continued to be insufficient until 1854, and during that time, the 200*l.* a-year was made up out of the income of the accumulated fund. Before the institution of the suit, the widow had requested the executors to sell the shares, but they had not complied therewith. Questions arose between the Plaintiff and Defendants as to the construction of the will,

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will, the widow insisting that the direction for the accumulation of the surplus income was within the provisions of 39 & 40 *Geo.* 3, c. 98 (the *Thellusson* Act), and that the accumulation therefore ceased to be lawful at the end of twenty-one years from the testator's death. She claimed to be entitled to all accumulations, as well before as since the expiration of such twenty-one years, and to all the future dividends upon the four shares.

The Defendants, the legatees for life in remainder, contended that the direction for accumulation was within the exception contained in the 2nd section of the statute as to debts, and that the surplus dividends on the four shares, after payment of 200*l.* to the testator's widow, ought to be accumulated during the widow's life, and that upon her decease, the shares and the accumulated fund, or the latter and the income arising from the four shares, or the income arising from the shares and from the accumulated fund, would belong to them.

The Defendant *Rose Faden*, one of the testator's next of kin, contended that the provision for the accumulation was void beyond twenty-one years, and that the accumulations since that time, and the future surplus dividends during the life of the widow upon the shares, after payment of 200*l.* a-year, were undisposed of by the testator's will.

This bill, filed by the executor, prayed that the rights and interests of the parties in the four shares, and the accumulations and the dividends and proceeds thereof, under the will of the testator, might be declared, and that the trusts of the will, so far as they related to the shares, accumulations, dividends and proceeds, might be carried into execution under the direction of the Court.

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The *Thellusson* Act (39 & 40 *Geo.* 3, c. 98) makes void any accumulation beyond twenty-one years from the death of a testator. But the second section contains the following exceptions :—

"Provided always and be it enacted, that nothing in this act contained shall extend to any provision for *payment of debts of any grantor, settlor or devisor or other person or persons*, or to any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise."

Mr. *R. Palmer* and Mr. *C. Hall*, for the Plaintiff, the surviving executor.

Mr. *Lloyd* and Mr. *E. Smith*, for the widow.

First. The directions for accumulation beyond twenty-one years from the testator's death are void under the *Thellusson* Act, and the case does not come within the exception contained in the second section, as being a provision for the debts of the testator. The debts referred to must be debts existing at the death, as in *Bateman* v. *Hotchkin* (*a*), and not debts which may possibly arise at any remote period. But debts incurred in respect of these shares after the testator's death cannot properly be said to be his debts, they are the debts of the owners for the time being of the shares.

Secondly. The widow is absolutely entitled to the accumulated fund. There is an absolute gift to her in the first instance, and that interest is only diminished to the extent to which it is afterwards cut down in favor

(*a*) 10 *Beav.* 426.

favor of other persons; *Ring* v. *Hardwick* (*a*); *Kampf* v. *Jones* (*b*); *Carver* v. *Bowles* (*c*).

Nothing is given over until the widow's death, when the shares or the purchase-money for them is bequeathed to the Defendants. Therefore, the whole of the income not required for the purpose of protecting the shares and its accumulations belongs to the widow.

Thirdly. The widow has a power of sale over the shares, or at all events is now entitled to call for their sale; *Sugden on Power* (*d*); *Warneford* v. *Thompson* (*e*).

Mr. *Selwyn*, Mr. *Burdon*, Mr. *Follett* and Mr. *Dart* for the parties entitled in remainder.

First. The direction for accumulation is perfectly valid, for the case comes within the exception contained in the second section; for that which is intended to be provided for are, the debts and liabilities of the testator arising from his execution of the partnership deed. But even if the debts be those of "other person or persons," still they are within the saving clause, for the legislature meant "that a man should, within the limits allowed by law, be able to provide not only for his own debts, but for the debts of such other person as he should think fit;" *Barrington* v. *Liddell* (*f*). Secondly. The widow is not entitled to the accumulated fund, for "the whole of the property arising from the shares or from their sales" is to go over to those in remainder. Thirdly. The widow is not entitled to call for a sale of the property, now that it has become depreciated, except with the assent of all parties interested in them.

Mr.

(*a*) 2 *Beav.* 352.
(*b*) 2 *Keen*, 756.
(*c*) 2 *Russ. & Myl.* 301.
(*d*) *Vol.* 1, *p.* 538 (*6th edit.*)
(*e*) 3 *Ves.* 513.
(*f*) 2 *De G., M. & G.* 498.

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Mr. *Bagshawe* for the next of kin of the testator. The accumulations after twenty-one years are void and belong to the next of kin; *Tench* v. *Cheese* (*a*).

The MASTER *of the* ROLLS.

On one of these two points I entertain no doubt, but I wish to consider the point on the statute. I do not doubt that the widow has a power of sale over these shares, or at least a power to call for a sale of them. It is impossible to get over the words "should the four shares be sold" and "but should she not sell the shares;" I must give some meaning to them. When was she to exercise the option? The testator does not limit any time, and why am I to say that she must exercise it within any given time? It is argued that if the executors came to the Court, they would be entitled to have them sold; but I think that all that the executors would be entitled to would be this:—seeing that they might incur a personal liability by holding the shares, they would be entitled to be indemnified against the consequences. That is really what the testator himself has done, and he has done that which the Court itself is in the habit of doing with respect to the future claims of the creditors of the testator against executors. Accordingly the Court has frequently set apart and has directed a fund to be accumulated, to afford a security for creditors and an indemnity to executors against the testator's covenants in a lease. Here the testator does the same thing, he sets apart a fund for the protection of these shares in such a manner as to meet any liability which may arise from time to time, for the purpose of preventing their destruction and of meeting any claim made in respect of them.

The

(*a*) 19 *Beav.* 3; 6 *De G., M. & G.* 453.

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The question as to accumulation could not have arisen before the *Thellusson* Act. If a testator having shares in a joint-stock company had given them to one for life, but had directed a part of the profits, arising from year to year during the life of tenant for life, to be set apart, for the purpose of answering any future liability, and had said, that on the death of tenant for life, whatever those accumulations might be, they should go to another, it is clear that before the *Thellusson* Act such a disposition would have been perfectly good. The *Thellusson* Act put an end to accumulations beyond certain limits and subject to certain exceptions; and the question is, whether this case comes within the clause of exception. There was no debt when the testator died, though there might arise a subsequent liability attaching upon his estate. I wish to consider that point.

With respect to other parts of the case, I am of opinion that the total amount of accumulation passes to those in remainder. The whole of the property arising from the shares is given, after the widow's death, to *Marianne* and *Louisa* for life, and upon their decease to the Plaintiff's other surviving children. In case these shares should be sold, and there should be a sufficient fund to meet all future liability, or if all liability ceases, the accumulated fund becomes capital, and will belong to the widow for life, and afterwards to the Defendants. I should say that, upon the sale, the accumulation will cease, that the fund will then be ascertained, and that the tenant for life will take the income.

The MASTER *of the* ROLLS.

July 27.

I have now to dispose of the question upon which I reserved

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I reserved my judgment, which was, whether the direction in this will comes within the provision contained in the second section of the *Thellusson* Act. The direction was to this effect:—the testator bequeathed four shares in the *Globe* newspaper, and directed, that whenever the profits exceeded 200*l.* a year, the excess should be accumulated "for the protection of those four shares."

Although the shares have varied considerably in point of value, still the result has been, that a large sum has been accumulated, and the question is, whether the accumulation can be allowed to go on beyond twenty-one years from the testator's death, or whether it can be sustained under the second section, as being a "provision for payment of the debts of the grantor, settlor or devisor, or of some other person." It is quite clear that it was not a provision for payment of the debts of the "grantor, settlor or devisor;" and the question is, whether it was a provision for the debt of any other person.

It was contended, that the debts referred to in the statute must be debts in existence either at the date of the will or at the death of the testator; but I do not think that that is the proper construction to be put on the clause, because, as this is an Act of Parliament restricting the rights of her Majesty's subjects, it must be construed most strictly where it restricts those rights, and most liberally where it gives an exception in their favor. And therefore, I think, "debts" must mean any debts of the grantor, settlor or devisor, or of any other person.

The question that arises is really this:—Whether an accumulation for an indemnity fund to protect the property

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perty of the testator is within the *Thellusson* Act or is not. This is strictly a case of that description, everything above 200*l.* a year is to accumulate for the purpose of protecting the shares during the life of the legatee for life. Protecting the shares, I think, means this:—That if there should be any unexpected call on the shareholders, in respect of the partnership, by reason of which, if there were no indemnity fund, some of the shares must be sold: this indemnity fund is applicable to meet that call. It appears to me to be analogous to a case of this description:—If a testator, for instance, had a long leasehold, of which there were thirty years to run, after his death, directed, by his will, that a certain portion of the rents should be laid out every year to accumulate at compound interest, for the purpose of meeting any liabilities which might ultimately fall on his estate at the termination of the lease, in respect of the covenants contained in it, I think, that within the limits which the law allows, that would be good, notwithstanding the *Thellusson* Act, and I think that the exception contained in the *Thellusson* Act allows of that accumulation to be made, and that the expression "debts of any other person or persons" must mean the liability which would fall on some one to discharge these particular obligations which would affect the property in the event contemplated by the testator. No doubt it must be *bonâ fide;* it must not be merely colorable for the purpose of evading the act, and the Court would have to determine that question when it arose. But in this case, I think there is no doubt about the *bona fides*, and I am of opinion that the accumulations are good. If the shares be now sold, the accumulations will not be required any longer. I decided, at the hearing, that the widow was not entitled to the amount of the accumulations; but I am of opinion that she is entitled to the interest to be derived from

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from the accumulated fund. The executors must be protected against any liabilities which they may have incurred or which they may be liable to hereafter; but as this fund will remain in Court, that will be sufficient to protect them.

DECREE.

Declare that the trusts for accumulation were valid until the sale hereinafter directed. Declare the widow entitled to call for a sale. Declare that the accumulated fund passed to those in remainder, subject to the widow's life interest therein. Declare the widow entitled for life to the income of accumulated fund. Direct a sale of the shares.

NOTE.—Affirmed by Lord *Campbell, L. C., Dec.* 17, 1859.

COOPER *v.* WORMALD.

Mar. 25.

Where, prior to a marriage, the parties transfer a fund to trustees upon trusts agreed on by parol only, and the instrument declaring the same trusts is executed after the marriage, it is perfectly valid as an instrument for valuable consideration.

A. and *B.* were trustees of a will, and they and the widow were the executors. The widow, previous to her second marriage, transferred a sum standing in her sole name to *A.* and *B.*, upon certain trusts agreed on between her and her second husband. After the marriage, the trustees of *A.* and *B.* declared the trusts accordingly. The fund was part of the testator's assets, but the second husband had no notice of that fact:—*Held*, that *A.* and *B.* held it on the trusts of the settlement, and not those of the will.

THE testator, in substance, gave his real and personal estate to *Stubbs* and *Walker* in trust for his widow, *Sarah Cooper*, for life, with remainder to his son, *Henry Cooper* (the Plaintiff). The testator appointed *Stubbs*, *Walker* and his widow executors.

The testator died in *June*, 1837, and his will was proved by the three executors. The widow, who was active in the management of the property, agreed to sell the good-will of the testator's business, with the household and trade furniture, &c. for 600*l.* The 600*l.* was paid by the purchaser to *Stubbs*, the executor, who handed it over to the widow, and she deposited it, in her

her own name, in the *Leeds* Bank. This account at the bank was afterwards increased by a deposit of 200*l.*, the particular source from which it proceeded did not so clearly appear, though it was stated to be part of the testator's estate.

Prior to *June*, 1838, the widow, *Sarah Cooper*, had engaged to be married to the Defendant *Wormald*, and they had agreed upon and given instructions for the preparation of the settlement, which was afterwards executed. They married on the 21st of *June*, 1838; but owing to a mistake of the solicitor's clerk, the settlement was not executed until the day after the marriage.

By the settlement, dated the 22nd of *June*, 1838, after reciting the will, and that *Sarah Cooper* possessed the 800*l.* deposited in the *Leeds* Bank, and an agreement that it should be transferred to *Stubbs* and *Walker* upon the trusts after declared, it was agreed, that *Stubbs* and *Walker* should stand possessed of the 800*l.* upon trust for the separate use of *Sarah Cooper* for life, and afterwards upon such trusts as she should by will appoint, and in default, in trust for Mr. *Wormald* for life, and afterwards for the children of *Sarah Cooper*.

The deed was executed by the trustees, *Stubbs* and *Walker*, who were also the executors of the testator's will. The 800*l.* was transferred to them on the 20th of *June*, the day prior to the marriage.

Mr. *Wormald* had no notice, on his marriage, that the 800*l.* did not really belong to Mrs. *Cooper* absolutely.

Sarah

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Sarah Wormald died in 1845, having by her will appointed the 800*l.* to her husband, Mr. *Wormald*, for life, with remainder to her son, *Henry Cooper* (the Plaintiff), for life, and then to his children.

Henry Cooper instituted this suit, praying a declaration that the 800*l.* and the security for the same formed part of the estate of his father, and was subject to the trusts of his will.

The cause now came on for hearing.

Mr. *Lloyd* and Mr. *M. A. Shee*, for the Plaintiff. The 800*l.* was part of the testator's estate, of which *Stubbs* and *Walker* were the trustees and executors. That fund was bound by the trusts of the will, and it was not possible for *Stubbs* and *Walker* to impress any other trusts on it while in their possession. When it was transferred to them on the 20th of *June*, they took it upon the rightful trusts, namely, those of the will.

The agreement before the marriage was void under the Statute of Frauds, 29 *Car.* 2, c. 3, s. 4, for it was merely by parol; *Warden* v. *Jones* (*a*); *Barkworth* v. *Young* (*b*). The settlement itself was post-nuptial and voluntary, and *Wormald* cannot claim as purchaser for valuable consideration, for he has no legal estate.

Mr. *Selwyn* and Mr. *Dart*, for Mr. *Wormald*. The husband married on the faith of this settlement; the contract was executed by the transfer of the money, and the question is:—for whom are *Stubbs* and *Walker* trustees? They have obtained the fund under the settlement, and have made a declaration of trust in favor of

(*a*) 23 *Beav.* 487. (*b*) 4 *Drewry*, 1.

of the objects of that settlement, and are therefore estopped from setting up, as against Mr. *Wormald*, any other trust than that which they have declared in his favor.

The MASTER *of the* ROLLS stopped the defence, and called for a reply as to the Statute of Frauds, saying, "I feel so strongly I ought not to call on the Defendant. Two persons enter into an agreement to marry, and one of them, the day before the marriage, transfers a sum of money into the names of two persons as trustees, and the day after the marriage these persons execute a deed declaring they hold the money in trust for the wife for life, and afterwards for the husband for life. Is not that good within the 7th section of the Statute of Frauds as a declaration of trust by the trustees?"

Mr. *Lloyd*, in reply, contended that that trust which was prior in date must prevail, and that no declaration of trust made by a trustee could prejudice the rights of his real *cestui que trust*.

Mr. *Bagshawe* and Mr. *Robson*, for the trustees.

The MASTER *of the* ROLLS.

I will state in the first place the principle which I think applies to this case, and then consider how far the facts bring the case within it; because, undoubtedly some complication arises from the fact that *Stubbs* and *Walker*, the trustees of the marriage settlement, are also the sole trustees, as well as two of the three executors of the will.

The proposition which I consider to be law is this, that

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that if a man upon his marriage with a lady, enters into a mere parol agreement with her, that a sum of money shall be transferred to trustees upon trusts for himself, his intended wife and the children of the marriage, and the money is, before the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact, that the instrument declaring the trusts is executed by them subsequently to the marriage, does not make it a voluntary instrument or enable creditors to set it aside, on the ground that it is not made *bonâ fide* in consideration of the marriage. I found my judgment upon that proposition.

I am of opinion, therefore, that if a lady and gentleman transfer the money before the marriage to trustees, upon the trusts agreed upon by them by parol merely, and the trustees accept the money accordingly, whether there be or be not any subsequent declaration of trust in writing, that transaction is good against all the world, and no creditor can set it aside.

The question subsequently arises in this form. The money was standing in the bank in the name of the intended wife to her separate account; it was transferred into the names of the two trustees of the settlement the day before the marriage; they executed a deed by which they declared the same trusts of this money as had been agreed upon before the marriage, and they called themselves and treated themselves as trustees of the settlement; all this is established by the evidence. But in fact the same persons were also trustees and executors of the will of the original testator, and the widow being also an executrix, they have allowed her to deal with the money as she pleased; it was standing in her name and was transferred by her to them, confessedly and on their own declaration in writing,

writing, in their character of trustees of the settlement. The question I have to consider is this:—whether it is possible for these trustees, as against the intended husband, and the issue of that marriage, or any person who had no notice of the fact, to say, that the circumstance of the money having originally belonged to another estate and been liable to other trusts, wholly annuls the trusts declared by them in the settlement of money, which came into their hands, solely in their character of trustees of that settlement. I am of opinion that it does not, and that it would be impossible, where the husband himself had no notice that the money was other than the money of the wife and where it had been transferred into the names of two persons for the sole purpose of the marriage settlement, to annul and set it all aside, because these two trustees happened also to be trustees of an estate from whence the money came. Still less could it be done against the children of the second marriage. If that be so, there is an end of the Plaintiff's case. The real question in this case is, to consider in what character the trustees hold the money, because nothing is more common than for the same persons to be, at the same time, trustees for different persons. You must therefore always distinguish in what character the money was received by them, and disregard, even if the question arose, in what character it ought to have been received by them: it would confuse all the trusts if, where money has been transferred to trustees expressly on the trust of a particular settlement, these trusts could afterwards be set aside by other *cestuis que trust* of the same trustees, saying, "this money came from another source, you were trustees of it, and you ought to have known that it came from that source, and you ought not to have declared any other trusts of it." The trustee may be guilty of and liable for a breach of trust, but in respect

 of the

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of the money itself, there are other persons who have become entitled for valuable consideration, and whose rights are not to be set aside by the fact that the money came from another source.

So regarding it, I am of opinion, upon the evidence of the deeds and documents themselves, that the money came into their hands as trustees of the settlement, and that they hold it as trustees for the persons entitled under that settlement.

I mean to express no opinion that, independently of any declaration of trust, a parol agreement between a husband and wife to settle a sum of money can be made good by proving the parol agreement entered into before marriage, and the execution of the settlement directly afterwards reciting the parol agreement. Such a case I consider quite different from *De Beil* v. *Thomson* (*a*), where a marriage took place on the faith of promises of which this Court compelled the performance.

This bill fails, so far as it asks for a declaration in favor of the Plaintiff, and it must therefore be dismissed with costs.

(*a*) 3 *Beav.* 469; 12 *Cl. & Fin.* 45.

1860.
June 6.

In re BARRINGTON.

A guardian *ad litem* must be appointed to infants who are served with petitions, intituled "in matters" and not in causes.

An order of course for the appointment of such a guardian *ad litem* may be obtained as of course.

A QUESTION arose as to the necessity of appointing a guardian *ad litem* to infant Respondents, in cases of applications by petitions *in a matter* and not in a suit. It was held that such an appointment was necessary *In re Ward, V. C. S.*, 16*th March*, 1860 (*a*).

(*a*) 6 *Jurist*, 441.

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In re BARRINGTON.

The MASTER *of the* ROLLS thereupon directed his secretary to issue orders of course for the appointment of guardians *ad litem* to infants served with such petitions, upon the usual affidavit of their solicitor, that they were infants, and that the proposed guardian had no interest in the matters in question and was a proper person to be appointed guardian, by whom they might appear on the petition.

THE BANK OF LONDON *v.* TYRRELL.

June 6, 7, 30.

A solicitor is accountable to his clients for the benefits which he may have derived clandestinely in transactions in which he was professionally engaged.

A solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking house on a joint speculation. After its establishment the company purchased part of the premises for their banking house, not knowing that their solicitor was interested in it:—*Held*, that the solicitor must account to the company for all the profit made by him by the whole transaction; but that the stranger was under no such liability.

THIS suit was instituted by the *Bank of London* against Mr. *Timothy Tyrrell* (their former solicitor) and against Mr. *Edward Rudson Read*, and the trustees of the bank. Its object was, to make Mr. *Timothy Tyrrell* and Mr. *Read* account for the profits made by them in a transaction, in which it was alleged Mr. *Timothy Tyrrell*, while their solicitor, had acted in collusion with Mr. *Read*. The substantial facts are as follows:—

In *September*, 1854, Mr. *Read* and some co-adventurers agreed to purchase, on a speculation, the *Hall of Commerce* and the adjoining property from Mrs. *Louisa Campbell*; the consideration was 49,200*l*. payable in *December*. Down to *December*, 1854, they had been unable to dispose of it, and Mrs. *Campbell* then consented to extend the time for completion to the 24th of *June*,

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June, 1855. It did not appear that Mr. *Timothy Tyrrell* had anything to do with this purchase down to the 5th of *February*, 1855.

About this time and previously, the *Bank of London* was in course of formation, and was advertised from a period not later than the end of the year 1854. The Defendant *Timothy Tyrrell* (a member of the firm of *Tyrrell*, *Paine* and *Layton*, solicitors) was one of the original promoters of the company, and he was actively engaged in its formation, and his firm were also the solicitors of the promotors, and afterwards of the bank, and he personally acted as such solicitor.

Preliminary meetings were held, and on the 19th of *January*, 1855, Sir *John Shelley* was applied to by Mr. *Tyrrell* to become a director and chairman of the company, to which he consented; on the 19th of *February*, advertisements were issued of the formation of the company, and on the 13th of *February*, the first meeting of the directors took place, when Mr. *Scott* was appointed secretary, and Messrs. *Tyrrell*, *Paine* and *Layton* were formally appointed solicitors to the bank. The charter of incorporation was not however obtained until *July*, 1855.

A negotiation, commencing on the 9th of *February*, 1855, took place between Mr. *Tyrrell* (acting for the bank), and Mr. *Read* for the purchase of the *Hall of Commerce* (part only of the property) for the bank. Mr. *Read* originally asked 110,000*l.*, but after considerable discussion as to the price, the directors ultimately agreed to purchase it for 64,500*l.*, and signed a conditional agreement dated the 5th of *May*, 1855. The purchase was completed by a conveyance from Mrs. *Campbell* and other parties to the bank, on the 11th

11th of *August*, 1855. During the whole of this transaction, Mr. *Timothy Tyrrell* had carefully concealed the fact that he had any interest in the *Hall of Commerce*, or in the profit arising from its re-sale. But in consequence of disputes between Mr. *Read* and his co-adventurers, two suits of *Davis* v. *Read* and *Lacy* v. *Read* were instituted, in which it was ultimately discovered, from the cross-examination of Mr. *Tyrrell* on the 29th of *April*, 1857, that he, in fact, was jointly interested with Mr. *Read* in the premises purchased of Mrs. *Campbell*, and in the profit derived from the sale to his clients, the *Bank of London*. It appeared thereby, that on the 5th *February*, 1855, Mr. *Read* had a conversation with Mr. *Timothy Tyrrell* respecting the projected bank, and that on the 6th of *February*, Mr. *Read* intimated his intention of purchasing the shares of his co-partners, and he proposed to Mr. *Timothy Tyrrell* to join him, which Mr. *Timothy Tyrrell* consented to do, if the shares of the co-partners were purchased on reasonable terms.

On the following day (the 7th of *February*) Mr. *Read* bought up the interest of his co-adventurers, and on the 8th of *February*, Mr. *Read* and Mr. *Timothy Tyrrell* verbally arranged the terms of their joint speculation, and by an agreement executed on the 10th of *February*, 1855, it was agreed, that the purchase was made by the two Defendants on a joint account, as tenants in common, that the purchase-money was to be contributed in the proportions therein mentioned, and that the future expenses were to be shared equally, and that neither party should sell or dispose of his interest without the consent in writing of the other.

By the purchase and sale of the *Hall of Commerce*, Mr. *Read* and Mr. *Timothy Tyrrell* each made a profit of

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of about 6,000*l.*, besides which, they remained joint owners of the portion of the property purchased from Mrs. *Campbell* remaining unsold, which the Plaintiffs alleged to be of the value of 8,000*l.* at the least.

The bank instituted this suit in *December*, 1857, detailing the above circumstances and submitting, that "under the circumstances, the said agreement entered into by Mr. *Timothy Tyrrell* with Mr. *Read*, and his subsequent concealment thereof, and of his interest in the hereditaments (the subject of the aforesaid negotiation), was a fraud upon the Plaintiffs, his employers, and that Mr. *Read* had throughout notice of and was a party to such fraud; and that neither Mr. *Timothy Tyrrell* nor Mr. *Read* ought to be allowed to retain, against the Plaintiffs, any gain or profit whatever, accruing to them from the transaction.

"That it would greatly facilitate the ascertainment of the amount of the profits made by the Defendants, upon the sale to the Plaintiffs, if they were compelled to convey to the Plaintiffs the remaining portion of the hereditaments comprised in the contract for sale from Mrs. *Campbell*, but subsequently withdrawn from the sale to the Plaintiffs; and the retention of such hereditaments by the Defendants, being, in fact, part of the profits made by them upon the transaction, the Plaintiffs submitted that they were entitled to such conveyance, the Plaintiffs being willing, and thereby offering, in that case, to give credit to the Defendants, in the account thereafter sought, for the whole of the purchase-money paid to Mrs. *Campbell* under her contract, and for all sums paid by the Defendants, or either of them, in buying up the claims of the said co-purchasers as aforesaid.

"That the premises purchased by the Plaintiffs were now

now used, and were necessary, for carrying on the Plaintiffs' business, and that they had expended large sums of money thereon, in total ignorance of the fraud practised upon them in respect thereof, and they could not now relinquish their purchase thereof, without great loss and inconvenience, for which hardly any money payment would be a sufficient compensation."

The bill prayed, that Mr. *Timothy Tyrrell* and Mr. *Read* might account to the Plaintiffs for the profits made by them, respectively, upon the sale of the hereditaments conveyed in trust for the Plaintiffs.

That Mr. *Timothy Tyrrell* and Mr. *Read* might also be decreed to convey to the Plaintiffs so much of the hereditaments comprised in the contract for sale of the 20th of *September*, 1854, as were not comprised in the conveyance of the 11th of *August*, 1855, "the Plaintiffs being willing, and thereby offering, in that case, to give credit to the Defendants, in taking the aforesaid account, for the whole of the purchase-money paid to Mrs. *Campbell* under her said contract, and for all sums paid by the Defendants, or either of them, in buying up the claims of the co-purchasers."

The bill neither alleged that the consideration paid was excessive nor did it seek to set aside the transaction.

The cause now came on for hearing.

Sir *Hugh Cairns* (Solicitor-General), Mr. *Selwyn* and Mr. *E. Macnaughten*, for the Plaintiffs, argued that an agent was answerable for the profits secretly made by him in a transaction in which he was employed, and that the same rule applied to a solicitor as regarded his client;

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Massey v. *Davies* (*a*); *Bentley* v. *Craven* (*b*); *The York and North Midland Railway* v. *Hudson* (*c*); *Beck* v. *Kantorowicz* (*d*). That, in the present instance, the arrangements entered into by Mr. *Tyrrell* formed but one transaction, and that during the whole of it, he was solicitor for the company or of the projected company, and that as to him, he was clearly accountable for all the profits made by him by the transaction. That Mr. *R. Read* had colluded with the solicitor in deceiving the company and had participated in the profits derived therefrom, and that he, therefore, was equally accountable; *East India Company* v. *Henchman* (*e*).

Mr. *R. Palmer* and Mr. *Speed* for Mr. *Timothy Tyrrell*. An agent employed to purchase may be accountable for the profits made by him personally in the transaction, but the first thing necessary to establish is that there existed an agency for that specific purpose. When *Read* and *Tyrrell* agreed to buy the property, *Tyrrell* had had no authority whatever to purchase or negotiate for the purchase of the property for the Plaintiffs. There was then no agency, nor was he even at that time the solicitor of the Plaintiffs, whose company was not established. The test of his agency is this:—Would the present company be bound by his contracts entered into on their behalf? Clearly not. The bill itself proceeds on the fact of his being appointed agent to purchase, for the fifth paragraph states, that as solicitor, *Tyrrell* "was employed by the said promoters and afterwards by the said bank, as their agent, to look out for and procure a site for the place of business of the bank, and by reason of his being such promoter and solicitor and agent as aforesaid was able greatly to influence,

(*a*) 2 *Ves. jun.* 317.
(*b*) 18 *Beav.* 75.
(*c*) *Unreported, but stated in* 25 *Beav. p.* 595.
(*d*) 3 *Kay & J.* 230.
(*e*) 1 *Ves. jun.* 287.

fluence, and did in fact greatly influence, the judgment of the promoters and the bank in selecting such site." There is no proof whatever of this allegation; he was never employed to look out for a site. If this be so, the Plaintiffs cannot now claim the benefit of the contract entered into by *Read* with his co-partners on account of himself and *Tyrrell.*

Secondly. As to the subsequent purchase by the bank from their solicitor. There is no rule to prevent a solicitor purchasing from or selling to his client; the case differs from that of a trustee and *cestui que trust.* Lord *Eldon* in speaking of the decree in *Cane* v. *Allen* (*a*) says, "If it proceeded on the ground that an attorney could not enter into a contract with his client, there was no such doctrine in our law." In *Edwards* v. *Meyrick* (*b*) a purchase by a solicitor from his client was sustained; and the Court will not, in such case, interfere, unless there appears to have been a great inadequacy of consideration, or undue advantage, or unless some great pressure has been exercised by the solicitor over his client. There is no case in which a bill has been filed by a client who has purchased from his solicitor, except to set the transaction wholly aside, and this is the only relief the Plaintiffs can be entitled to. Here the consideration given by the bank is proved to be less than its value, the Plaintiffs do not even complain of any inadequacy of consideration, or of any advantage having been taken; they, on the contrary, adopt the purchase and purpose to retain it. All they are possibly entitled to is either to adopt or to repudiate the transaction; *The Great Luxembourgh Railway Company* v. *Magnay* (*c*); but they have no right to an account of the profits made by their solicitor by an independent arrangement with other parties.

Hichens

(*a*) 2 *Dow. p.* 294. (*b*) 2 *Hare*, 60. (*c*) 25 *Beav.* 586.

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Hichens v. *Congreve* (*a*); *Taylor* v. *Salmon* (*b*); *Fawcett* v. *Whitehouse* (*c*); *Lees* v. *Nuttall* (*d*); *Fox* v. *Mackreth* (*e*); *Gibson* v. *Jeyes* (*f*); *Driscoll* v. *Bromley* (*g*) were cited.

Mr. *Follett* and Mr. *Martindale*, for Mr. *Read*, were stopped.

The MASTER *of the* ROLLS thought that no case had been made against Mr. *Read*, and that the bill must be dismissed as against him. But he said, that considering his conduct as regarded his solemn declaration and his evidence in the other cause, he could give him no costs.

Sir *Hugh Cairns*, in reply.

The MASTER *of the* ROLLS.

June 7.

This is a suit instituted by a joint-stock company of bankers incorporated by letters-patent. The principal object of it is, to make the first Defendant on the record account for and refund to the Plaintiffs the profits alleged to have been derived by him, arising out of a transaction in which he is said to have acted as the agent for the Plaintiffs, and to have thereby obtained certain benefits, which he derived solely in consequence of his filling that character. The fact, or more properly speaking, the extent of the agency is disputed; the circumstances of the case must therefore be carefully examined, in order to ascertain what was the peculiar character of the relation which existed between Mr. *Tyrrell*

(*a*) 4 *Russ.* 562.
(*b*) 4 *Myl. & Cr.* 134.
(*c*) 1 *Russ. & Myl.* 132.
(*d*) 1 *Russ. & Myl.* 53.
(*e*) 2 *Cox*, 320; 4 *Bro. P. C.* 258.
(*f*) 6 *Ves.* 266.
(*g*) 1 *Jurist* (*O. S.*) 238.

Tyrrell and the Plaintiffs, and thence to determine the nature and extent of the duties and liabilities flowing from that relation, and which, by reason of it, were imposed on him.

There is little or no dispute about the principal facts of this case. A lady of the name of *Campbell* was the mortgagee from *Moxhay*, who was then dead, of certain extensive premises situate in the most valuable part of the city of *London*, with a frontage of upwards of ninety feet in *Threadneedle Street*, and extending backwards for a distance of about 140 feet on one side to *Old Broad Street*, in which there was a frontage of twenty-one feet, and on the other side to a place called *Cushion Court*. The largest and most valuable part of this property was known by the name of "*The Hall of Commerce*." The exact amount due to this lady on her mortgage does not very distinctly appear; it was, however, about 40,000*l*. The executors of *Moxhay* were unable to raise the amount sufficient to discharge it, and accordingly were compelled to allow Mrs. *Campbell* to foreclose the mortgaged property by a suit in equity, under which she became the absolute owner of it. After keeping the property some time, she entered into a contract, on the 20th *September*, 1854, to sell for 49,200*l*. the whole property to four persons, who bought on behalf of themselves and five other persons, on which occasion a deposit of 1,000*l*. was paid to her. These nine gentlemen were interested in tenths; Mr. *Read* (the second Defendant on the record) had two-tenths, and the other eight had one-tenth each. Mr. *Read* contributed 200*l*. and each of the others his 100*l*. towards payment of the deposit. The object of the purchasers was speculation, expecting to derive a profit, by disposing of the property again at an increased price. On the 23rd of *December*, 1854, Mrs. *Campbell* was induced

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induced to extend the time for completing the purchase for six months, that is, till *June*, 1855.

In *January*, 1855, Mr. *Scott*, the present secretary of the company, and the Defendant Mr. *Tyrrell*, set on foot a plan for establishing the joint-stock banking company, which finally resulted in the establishment of the present Plaintiffs under the title of "*The Bank of London.*" Four preliminary meetings were held for this purpose in *January*. On the 19th of *January*, Sir *John Shelly* was applied to by Mr. *Tyrrell* to become a director and chairman of the company, if it should be formed. He agreed to this, and on the 5th of *February* he was applied to to name another director. On the 9th of *February*, advertisements were issued for the purpose of founding the company.

On the 13th of *February* the first meeting of directors took place, *Scott* was appointed secretary and Mr. *Tyrrell* and his two partners, *Paine* and *Layton*, were appointed solicitors of the Company. About a week previously to this meeting, *Read* had become the sole owner of the property bought from Mrs. *Campbell*, by purchasing the shares of the other eight co-adventurers for a sum of 150*l.* each, which repaid the deposits of each and gave each a premium of 50*l.* Immediately afterwards, Mr. *Read* made proposals to the company to sell to them that portion of the premises purchased from Mrs. *Campbell* which was known as "*The Hall of Commerce.*" After considerable negociation on the subject, a contract was finally entered into on the 5th of *May*, 1855, by which the Plaintiffs agreed to give Mr. *Read* 64,500*l.* for the *Hall of Commerce*. The contract was finally completed on the 11th *August* following. Out of the purchase-money, 48,410*l.* 4*s.* 2*d.* was paid to Mrs. *Campbell*, the amount then

then due on her purchase-money, and the residue, subject to a deduction, to abide the result of a claim I shall presently mention, was paid to *Read*. Out of this residue a sum, the exact amount of which I have not ascertained from the evidence, but as I calculate about 6,000*l*. or 7,000*l*., was paid or is now to be paid to the Defendant *Tyrrell*, who was no party to the deed of conveyance, and whose interest in the property was, at that time, wholly unknown to the Plaintiffs.

The Plaintiffs discovered this fact at the end of *April*, 1857, and filed this bill in the *December* following, and they contend, that Mr. *Tyrrell* is not merely liable to account for the money so received by him, but also for the interest he has acquired in that portion of the property bought from Mrs. *Campbell*, which still remains unsold. Their right to this relief is rested on the evidence, which explains the dealings which existed between *Read* and *Tyrrell* respecting this property, and the relation in which he stood to the Company. I have already stated, that *Scott* and *Tyrrell* were the founders of the company, and held four meetings for that purpose in *January*, 1855, that in that month Sir *John Shelly* agreed to become chairman and director, and that the proposed list of directors was near completion on the 5th of *February*, as appears by a letter of that date addressed by Mr. *Tyrrell* to Sir *John Shelly*. It had been previously, though provisionally, arranged between Mr. *Scott* and Mr. *Tyrrell*, that if the company were formed, Mr. *Scott* was to be the secretary and Messrs. *Tyrrell*, *Paine* and *Layton* were to be the solicitors of the company. The first meeting of the proposed company was on the 13th *February*, although advertisements had been issued for the formation of it on the 9th. On the 5th or 6th of *February* an interview took place between Mr. *Read* and Mr. *Tyrrell*, in

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in the course of which, it appears from the evidence given by Mr. *Tyrrell*, in cross-examination in the cause of *Lacy* v. *Read*, which I understand to be made evidence in this cause, that the following subjects were discussed between Mr. *Read* and Mr. *Tyrrell*, viz., the formation of the company, the necessity that the company would have for a place of business, and the eligibility of "*The Hall of Commerce*" for that purpose. What further passed on the same day between Mr. *Read* and Mr. *Tyrrell* is set forth in the 6th paragraph of Mr. *Tyrrell's* answer, it is to this effect:—

"On the 6th of *February*, 1855, the Defendant *Edward Rudston Read* called upon and informed me of particulars of the aforesaid agreements of the 20th of *September* and the 23rd of *December*, 1854, and he also informed me that the said agreements had been entered into as a speculation, and that several of the persons with whom he was associated therein had not any means, and that the management of it had been very unsatisfactory to him, and that he had determined either to buy the shares of all his co-speculators or to sell his own, and that he had consequently offered to them either to buy or sell, at some price per share, the amount of which I do not now remember. He also stated, that his co-speculators appeared to be afraid of their responsibility under the said agreement, but that he considered that the property might be made a good investment, provided money was spent upon it. I had long known the property, and I believed it to be of a value far exceeding the amount agreed to be paid to Mrs. *Campbell*, but as past experience had proved that the large hall was too extensive for profitable occupation, I concurred in a suggestion, made by the said *Edward Rudston Read*, that it might be advantageously converted into a counting-house. The Defendant *Edward Rud-*

ston

ston Read then proposed that I should join him in the speculation, if he should become the purchaser of the shares of his co-speculators at a reasonable price, and to carry out the scheme of converting the large room into counting houses, and by the purchase of adjoining property on the *Cushion Court* side of it, and fronting *Broad Street*, to lay into one large plot the frontage in *Broad Street*."

"Either at the same meeting on the 6th of *February*, or on the following morning (I am not certain which), the said *Edw. Rudston Read* shewed me certain plans and estimates of his suggested alterations in the said large room, all of which had been made by a surveyor or architect of the name of *Wood*, of which plans I entirely approved."

On the 7th of *February*, Mr. *Read*, entered into the arrangement with his co-adventurers, which I have already noticed. On the following day (the 8th), Mr. *Read* and Mr. *Tyrrell* again met, and entered into a verbal agreement which was not reduced into writing until the 10th of *March* following, but which then was made to bear date the day on which the verbal arrangement had been entered into. It was to this effect:— "Articles of agreement made and concluded this 8th day of *July*, 1855, between *Edward Rudston Read*, of *Austin Friars*, and *Timothy Tyrrell*, of *Guildhall Yard*, *London*. Whereas *E. R. Read* became the purchaser of the hereditaments mentioned in the agreement hereinafter specified, upon the terms and conditions therein stated; and whereas the purchase, though made in the name of *E. R. Read*, was made on the joint account of himself and *T. Tyrrell*, except as to the part colored green on the plan to the first schedule to this agreement, which is to belong to *E. R. Read* exclusively: *Now, therefore*,

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therefore, it is hereby agreed,—1st. That the purchase, except as aforesaid, was so made on a joint account as tenants in common. 2nd. That the purchase-money, viz. 1,200*l.*, as appears by the agreement, and 300*l.*, together with the costs provided to be paid by the agreement, be borne and paid as follows:—two-fifth parts thereof respectively by *E. R. Read*, and three-fifth parts thereof by *T. Tyrrell;* but all further costs and expenditure to be paid or contributed by them in equal moieties. 3rd. That if, in selling the property, it shall be deemed advisable to include the said excepted part, so coloured green as aforesaid, *E. R. Read* shall be entitled to the value thereof over and above his half of the purchase-money for the residue. 4th. That neither party shall sell or otherwise dispose of his share or interest in the property without the consent in writing of the other of them. 5th. That if, in the management of the property, the alterations, repairs, sale, lease or other dealing with the same, any difference of opinion shall arise between the said parties, the same shall be referred to arbitration."

On the 9th of *February*, the following day, *Read* wrote to *Tyrrell* in answer to some communication from *Tyrrell*, stating that the price of the *Hall of Commerce* was 120,000*l.*; *Tyrrell* asked for a fortnight before returning any answer, which was assented to. It was not till the 19th *March* that the question of the sale was brought formally before the directors, but on that day, *Tyrrell*, as the solicitor of the company, charges the Plaintiffs, in his bill of costs, for an attendance on *Read*, with reference to the sale of this property. The negociations proceeded, all the communications on the subject by *Read* were addressed by him to *Tyrrell*, and by *Tyrrell* communicated to the company through Mr. *Scott*, the secretary. On the 2nd of *April*, the bank passed

passed a resolution appointing *Tyrrell* their agent to negotiate the matter of the purchase with *Read*, but limiting the price to 60,000*l.* The negociations continued, and, finally, on the 3rd of *May*, 1855, at a meeting of the directors, the report of Mr. *Paine*, on behalf of the firm of *Tyrrell & Co.*, and that of Mr. *Scott*, the secretary, was laid before the directors, with a draft agreement.

On the 5th of *May*, an agreement in writing between Mr. *Read*, of the one part, and the directors of the other part, was duly executed, by which they agreed to become purchasers of "*The Hall of Commerce*" at the sum of 64,500*l.*, conditionally on the bank obtaining a charter of incorporation. This charter was obtained on the 13th of *July*, 1855, and the agreement for purchase was carried into effect by an indenture bearing date the 11th *August*, 1855, executed by and between *Louisa Campbell* of the first part, *Edward Rudston Read* of the second part, and the directors of the company of the third part, and by it, in consideration of the sum of 48,410*l.* 4*s.* 2*d.* paid to Mrs. *Campbell*, the amount then due to her under the contract for sale, and of the sum of 16,089*l.* 11*s.* 10*d.* paid to Mr. *Read*, making together the sum of 64,500*l.*, the premises and hereditaments comprised in the agreement of the 5th *May* were duly conveyed unto and to the use of the directors of the said company.

Up to this time, no suspicion of the interest of Mr. *Tyrrell* seems to have been entertained by any one, not even by his partners, but it came to the knowledge of the Plaintiffs in the following manner:—On hearing of the sale to the company, Mr. *Read's* eight co-adventurers became dissatisfied with the arrangement entered into by them of 7th *February*, 1855, and insisted on their

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right to participate in the profit; and three of them, before the completion of the purchase, gave notice of their claim to Messrs. *Tyrrell* & Co., the company's solicitors, for and on behalf of the company. In consequence of this notice, it was agreed between Mr. *Read* and the company that the company should accept the conveyance from Mrs. *Campbell* and Mr. *Read*, as already mentioned, provided the sum of 14,500*l.* were invested in exchequer bills and set apart to abide the determination of the claim, of which notice had been given, and this was accordingly done.

In *December*, 1855, three of these gentlemen filed the bill of *Davis* v. *Read*, to enforce their right. That suit was compromised in *November*, 1858, by payment of 1,050*l.* to them, together with their costs of the suit. Shortly afterwards, two other of these co-adventurers filed a similar bill against *Read*, entitled *Lacy* v. *Read*, which was also compromised on payment of 666*l.* 13*s.* 4*d.* and the costs of the suit. But in the course of that suit, and on the 29th of *April*, 1859, Mr. *Tyrrell* was cross-examined by the Plaintiffs, and in his cross-examination he stated the particulars of his interest in the property under the agreement entered into by him with *Read*.

This was communicated to the directors, and the result was the institution of this suit in the month of *December* following.

On the first question of agency, I think it must be taken that Mr. *Tyrrell* acted as agent of the company throughout, and that for the following reasons:—

It is to be observed, that throughout the proceedings which I have detailed, Mr. *Read* communicates with Mr.

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Mr. *Tyrrell* for the sale, not as to him personally but as to the company about to be formed; that he communicates with him, therefore, as a person who either possessed or was about to possess such a relation towards the company, then in the course of formation, as enabled him to deal with the subject on behalf of that body; that *Tyrrell* adopts this character in which *Read* addresses him throughout the transaction in question, and in that character, he communicates to the secretary of the company the proposals made by *Read*. The circumstances that the company was not formed, even provisionally, till the 13th *February*, that it was not till the 20th of *April* that the number of persons, required by law to enable them to obtain a charter, had executed the deed of settlement, and that it was not till the 13th *July* that the company obtained its charter, are all of them facts which do not appear to me to destroy or weaken the character of agent, belonging to Mr. *Tyrrell*, towards the body of persons engaged in forming, and who afterwards formed, the company in question. Mr. *Tyrrell* was the self-constituted solicitor of the company before its complete formation, he was recognized as such when it was formed, and his claim upon the company for work and labour done on behalf of the company extends, and properly extends, to an earlier period than that of its complete formation. The relation between them must, in my opinion, be considered as commencing from that period at which he claimed a right to charge them with the remuneration due for services done on their behalf, and which right was admitted and sanctioned by the company, and which services were paid for accordingly. The general bill of costs against the company contains a general item, amounting to twenty guineas, which is solely applicable to *January*, 1855. The first regular items with any distinguishing date began on the 13th of *Feb-*

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ruary. The particular bill of costs for the business relating to this purchase begins on the 19th of *March*, which bill is thus entitled:—

"Messrs. *Tyrrell, Paine* and *Layton's*, solicitors, bill of costs, charges and expenses in and about the formation and preliminary to the application for and including the grant of letters-patent to the '*Bank of London*,' pursuant to stat. 7 & 8 *Vict.* c. 118.

	£	s.	d.
"1855, *January* and *February*.			
"For very numerous attendances during these two months upon and correspondence with Sir *John Shelley*, Mr. *Scott*, Mr. Alderman *Muggeridge*, Mr. *H. Taylor* and other parties, proposing to establish a new joint-stock bank, and advice and conferences from time to time thereon. Attending various other gentlemen whom it was proposed should act as directors, drawing and settling prospectus, &c. previous to the meeting, at which it was determined to establish a bank, under the name of "*The Bank of London*," and that Mr. *B. Scott* should act as secretary thereto.	21	0	0
"Drawing form of application for shares, and fair copy, and attending printer therewith and instructing him.	0	13	4
"Drawing resolutions to be come to at meeting, attendances, settling same, and fair copy	1	1	0
"Attending secretary, and conferring with him, as instructed by directors, as to advertisements to be inserted, so as to secure the greatest publicity at as little expense as possible, and it was determined to advertise at once in all the *London* morning papers, the *Shipping Gazette* and certain of the weekly papers,			

	£	s.	d.
papers, in two *Manchester* and two *Liverpool* papers, and one *Glasgow* paper and the *Leeds Mercury*	0	13	4"

The bill of costs for the purchase is this :—

" *The Bank of London.*

" To Messrs. *Tyrrell, Paine* and *Layton,*

" In relation to the negociations for and the purchase of the bank premises.

	£	s.	d.
" 1855, *March* 19.			
"Attending upon Mr. *Read,* upon his proposing to us the *Hall of Commerce* for the bank, discussing the terms and correspondence with that gentleman, and attending the secretary thereon.	0	13	4"

There then follow various items of a similar character.

It is contended, on behalf of Mr. *Tyrrell,* that he could not be the agent for that which had no existence, and that as the company had no directors and had not held any meeting or even a nominal existence before the 13th *February,* Mr. *Tyrrell* could not be their agent on the 8th *February,* when he became interested in this property. To this there are two answers. In fact, there was no binding agreement between Mr. *Tyrrell* and Mr. *Read* before the 10th *March,* but even if this were otherwise, I am not disposed to concur in the argument of the Defendant. One person may be made the agent of another by acts done *ex post facto.* If one profess to act as the agent of *A.* without any authority for so doing, *A.* may, by recognizing him as his agent and sanctioning and adopting his acts done in that assumed character, constitute that person his agent from the

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the time when he professed to act in that character, although he did so without authority. It is therefore in my opinion established, that the relation of solicitor and client not only existed between Mr. *Tyrrell* and the company, but that having regard to the circumstances I have here detailed, as Mr. *Tyrrell* was adopted as the solicitor or agent of the company, he must be considered as having been the agent of the company in all matters in which he professed to act as such agent, that is, in all matters relating to the company which was afterwards formed, and consequently in all matters in which *Read* dealt with him as such agent, and in which he professed to act towards *Read* in that character.

The fixing of this period of time becomes material from the view I take of this case, which I shall presently explain more distinctly. Mr. *Tyrrell's* duties, therefore, in his character of agent, and his liabilities as such, date from the time when he first acted in any matters relating to the company, and in this view, it became comparatively immaterial, that on the 2nd *April*, he was, by a resolution passed and entered in the books of the company, specially appointed their agent to negociate this purchase, and that Mr. *Tyrrell* acquiesced in this resolution and acted under it.

In this state of circumstances, the counsel for Mr. *Tyrrell* admit, that if the company had desired to set aside the transaction, the sale could not stand, and they do not dispute the right of the Plaintiffs to restore to Mr. *Tyrrell* the interest he may have in the property, which they purchased from *Read*, and their right to receive back again so much of the price they paid as may be attributable to that interest; but they contend, that the right of Plaintiffs is limited to this relief, that they must either adopt or repudiate the transaction altogether,

altogether, and there can be no question that this, in ordinary cases of a sale by an agent to his principal, is the measure of the equity to which the principal is entitled; at least it is so where the parties can be replaced in the same situation that they were in before the sale took place. In many cases, however, this is impossible; it is obviously so in the present. Not merely have the Plaintiffs set up their place of business on the premises purchased before they had notice of the Defendant's interest, not only have they expended considerable sums of money in adapting the building to their own purposes, but the equity which they have against Mr. *Tyrrell* does not necessarily extend itself to Mr. *Read*, and certainly not to Mrs. *Campbell*, between whom and themselves no such relation of principal and agent existed, and the latter of whom was wholly ignorant of the whole transaction, and the purchase of whose interest the Plaintiffs could not successfully dispute or repudiate. What relief then can the Plaintiffs have against their agent Mr. *Tyrrell* in such circumstances? The Defendant says none at all, and the case of the *Great Luxembourg Railway Company* v. *Magnay* (*a*), decided by me, is strongly pressed upon me to support this contention. Not only are the circumstances there existing strongly urged upon me, but an illustration, which I suggested in the course of the observations I made, for the purpose of explaining the judgment I then pronounced, is relied on as establishing, that if that case be law, the Plaintiffs' equity is confined to undoing the transaction, as far as it can be unravelled, and that if the Plaintiffs decline this they can have nothing.

Upon a careful perusal of that case, I adhere to the views

(*a*) 25 *Beav.* 586.

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views I then expressed, but I think that a wide distinction exists between the facts of that case and of the present. In that case, the *Luxembourg Railway Company* sought to set aside the purchase of a *concession* made by the Belgian government, which had in fact been made to the Defendant, who was afterwards chairman of the company. The company, at his instance, bought this *concession*, being ignorant that he was the original *concessionnaire*. On the discovery of that fact, they filed a bill impeaching the transaction. After the suit was instituted, they assumed to be and acted as the owners of the *concession*, and sold it to a stranger for value. I held, that they had adopted the transaction with full knowledge of the circumstances, and that they had thus rendered it impossible for them to give to the Defendant what he had a right to require. There was, when the bill was filed, no difficulty in replacing the parties in the situation in which they were when the contract was entered into; but the acts of the Plaintiffs had rendered this impossible, and this after they had brought the cause to a hearing. If, in this case, the property had belonged exclusively to Mr. *Tyrrell*, and if, after acquiring knowledge of that fact, the Plaintiffs had sold the property, or had taken possession of it and had altered it to suit their business, and made it such that it could not be restored to the Defendant, I should have held that their relief was barred.

Similar observations apply to the case which I suggested, by way of illustration, in the judgment I gave in the *Luxembourg Railway Company* v. *Magnay*, and which, if I repeat here and comment upon, step by step, will conveniently illustrate my meaning in that case, and the view I take of the present. I suggested the case of a company purchasing, apparently from a stranger, an estate required for their business, which really belonged

longed to their agent. On discovery of that fact, their equity would be to set aside the whole transaction or to adopt it, and if, after knowledge of that fact, they either had parted with the property or had so used and appropriated the property as to make it impossible to return it, they would have lost their right to relief.

Take it one step further, and suppose that the company had appropriated and used the property in such a way as to make it impossible to return it, while they were in total ignorance that it had been the property of their agent, in that case I expressed my opinion, that the relief to which the company would be entitled, as against the agent, would be limited to the recovery of what, if anything, had been paid by the company, over and above the full value of the property.

But both of these cases proceeded on the assumption that the property purchased by the principal had originally been the property of the agent, or, if acquired since, that it had been so acquired in no character connected with or springing out of his agency, and, accordingly, this was how the matter stood in the case of the *Luxembourg Railway Company* v. *Magnay*. The Defendant there had not obtained the *concession* by reason of his being the agent or chairman of the company, or in any way by reason of advantages derived from his being connected with it. It was not necessary, therefore, in that case, to pursue the point any further; but for the case now under consideration, it becomes necessary to consider the next step in the case I have suggested. Suppose that the agent, knowing the peculiar eligibility of the estate for the purpose of the company, and while he was agent, and for the purpose of selling it at an advanced price to his principal, the company, had himself become the purchaser of the estate,

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estate, and that, in ignorance of this circumstance, the company had purchased the estate from one whom they supposed to be a stranger, while, in fact, the agent was the real owner, and who was entitled to and, in fact, received the whole of the purchase-money paid by the principal. In such a state of things, a wholly new equity arises; it is not then a question about setting aside the transaction, neither is it a question of what is or was the true value of the property, but the question then is, whether the agent has not, by means of his agency, acquired this property for the purpose of making a profit out of it by a resale to his principal, and whether, if he succeed in his object, he can keep that advantage to himself. If it were the case of iron or sugar bought by the agent and resold to the principal, I have held that the agent cannot keep the profit; why should he be better entitled to do so in the case of the purchase of an estate than of goods? In my opinion, the same principles apply to both, and the profit to be derived from land so acquired and so resold is not to be retained by the agent, any more than the profit to be derived from sugar, iron or any other commodities, provided it be well established that the profit made arises from his character of agent, and springs out of his employment as such.

It is, in this last view of the case, that it becomes material to ascertain the time when Mr. *Tyrrell* first became the agent of the company, for if his interest in the property had been acquired a year previously, or if it had been acquired by devise or descent at any time, the question on this point would have been concluded.

The next question therefore to be considered is, whether the acquisition of his interest in the property from Mr. *Read* sprung out of, and was attributable to, Mr.

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Mr. *Tyrrell's* character of agent to the company. On this point a close examination of the evidence has brought me to the following conclusions:—In the first place I am of opinion that there was no binding agreement between Mr. *Tyrrell* and Mr. *Read* before the 10th of *March;* the parol agreement was binding on no one, and my belief, derived from the whole evidence, is that if the company had not been formed, the agreement of the 8th of *February* would never have been a binding one. I am further of opinion that the success which Mr. *Scott* and Mr. *Tyrrell* met with in the preliminary steps for founding this company was such as to lead them confidently to the well-founded belief, that the company would be very shortly formed and very successfully established; that this belief was imparted by Mr. *Tyrrell* to Mr. *Read* on the 5th or 6th of *February,* that in consequence of all this Mr. *Read* made the arrangements of the 7th of *February* for purchasing the shares of his co-adventurers, and that, again in consequence of all this, he and Mr. *Tyrrell* entered into the parol agreement of the 8th of *February,* which was reduced into writing and made binding on them by the agreement executed on the 10th of *March.* I look in vain for any motive explanatory of these transactions, and the accompanying facts, except the desire to make use of Mr. *Tyrrell's* position towards the company for the purpose of inducing the Plaintiffs to purchase the premises in question. That the property is one of great value is, I think, clear; that the Plaintiffs did not give more for it than it was well worth to them is, I think, also clear; but it must be nevertheless borne in mind that a property of this description is an object of acquisition to but a very limited number of competitors. The number of persons who require such a building to use for their own business is very small, and that small number is much diminished when confined to those amongst

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amongst them who have the means sufficient to enable them to make the purchase. In fact the purchasers, unless for speculation, are reduced almost exclusively to some species of public company. The difficulty of disposing of such a species of property is established by the facts of this case beyond question. For some years the representatives of the mortgagor were unable to raise the amount of the mortgage money on the whole property, not exceeding 40,000*l.*, and were compelled to allow it to be foreclosed. The mortgagee seems, for some time, to have been unable to sell it, and even then only to speculators, who bought with a view to sell again, and who, unless they could dispose of it to some public company, would, as it seemed highly probable, have gained little or nothing by their adventure. The opportunity of sale to a public company occurs but rarely; here was an opportunity, such as might not occur again for a considerable time; it was of the greatest importance to seize the opportunity and make the most of it; and this is, in my opinion, the key to the dealings between Mr. *Read* and Mr. *Tyrrell*. Except for the advantages to be derived from Mr. *Tyrrell's* position, what motive can be assigned for Mr. *Read* voluntarily relinquishing nearly one-half of the profits to be derived from the increased price of the property? It would be contrary to every principle of human nature to suppose that he meant to make a valuable present to Mr. *Tyrrell* without receiving any equivalent. What Mr. *Read* meant was to convert Mr. *Tyrrell*, who was one of the founders of the company, who was to be the solicitor and confidential adviser of the company, into a zealous partisan instead of an indifferent or a hostile counsellor. What other principle can explain the compact, entered into between Mr. *Read* and Mr. *Tyrrell*, that the whole of their dealings should be kept secret? A compact which Mr. *Read* considered himself bound in honor to keep,

keep, although at the expense of a statutory declaration and of evidence on oath, both, I regret to say, on these points, at variance with the truth.

The reason is obvious why the concealment from the company of Mr. *Tyrrell's* interest was considered to be essential for the attainment of the object. If the company had known that Mr. *Tyrrell* was to derive a pecuniary advantage from the sale, they certainly would have distrusted and rejected his advice, and they possibly would have closed the negotiation for purchase with Mr. *Read* altogether. These are the circumstances that convince me that the dealings between Mr. *Tyrrell* and Mr. *Read* sprung out of the peculiar position he held towards the company, and that but for this, he would have obtained from Mr. *Read* no interest in the property.

To the argument, therefore, that the interest was acquired by Mr. *Tyrrell* before the company was formed, I attach but little weight; it was, in my opinion, acquired with a view to the company then in the course of formation, and it was acquired by reason of the influence which, if the company was formed, Mr. *Tyrrell*, as one of the original founders, must necessarily possess over the directors, the greater part of whom must have been either named or approved of by him, in conjunction with Mr. *Scott* and their joint nominees.

I am of opinion, therefore, that the share of the purchase-money received by Mr. *Tyrrell*, over and above the sum expended by him, must be treated as profits derived by him from dealings entered into with Mr. *Read* by Mr. *Tyrrell* in his character of agent for the company, and that he must account for this to the company.

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The next question is, how far do these profits extend? The Plaintiff contends that if the principles on which I have viewed this case are to prevail, the share which Mr. *Tyrrell* takes as tenant in common in the unsold portion of the property purchased from Mrs. *Campbell* must also be regarded as profits derived by him from the transaction. On this part of the case I have felt very considerable hesitation. It may reasonably be contended that all that the company can obtain is, that they should have the property at the price at which Mr. *Tyrrell* might have obtained it for them if he had no interest in the matter, and if he had exerted himself to the best to obtain it for them at that price. So regarding it, I doubt certainly whether it would have been obtained from Mr. *Read* at a less sum than that which he received for it; but I think that I cannot safely act on this, and that I cannot found any decision on this, which is mere matter of speculation. If I am right in my view of this case, the profit Mr. *Tyrrell* derived from the position he held as agent was the profit he derived from his dealings with Mr. *Read*, and this profit is the net value of the interest he takes in the hereditaments purchased from Mrs. *Campbell*. I think that the Plaintiffs might with propriety, acting in a liberal spirit, disclaim all interest in the unsold portion of the property; but if they insist on it, I am of opinion that they are entitled to a declaration, that Mr. *Tyrrell* is a trustee for them of that interest in the unsold portion of the premises, which he takes under the agreement of the 10th *March*, 1855, but which bears date the 8th *February* of that year.

The costs must follow the events.

I disposed of the case, so far as Mr. *Read* was concerned at the time of the hearing. Further consideration confirms

confirms me in that view, nor can I find any principle which would justify me in giving any relief against him. He dealt with the company as a stranger, and between him and the company no other relation exists. But it is equally impossible, seeing how he has acted in this matter, to give him any costs, and against him the bill will be merely dismissed.

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FOX *v.* FOX.

July 25.

A testator devised and bequeathed his real and personal estate to his widow, "to and for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for my dear children:"—*Held*, that there was no trust in favor of the children.

THE testator, *Robert Barclay Fox*, by his will, dated in 1854, gave as follows:—

Finally, I give, devise and bequeath unto my tenderly beloved wife, *Jane Gurney*, all the residue of my estate, both real and personal, "to and for her own use and benefit, absolutely, having full confidence in her sufficient and judicious provision for my dear children." He appointed his wife and *Alfred Lloyd Fox* his executors.

The testator died in 1855, and a question arose, whether, under the residuary devise and bequest, *Jane Gurney Fox* was absolutely entitled, for her own benefit, to the residuary real and personal estate, or whether such residuary real and personal estate was devised and bequeathed subject to a trust for the benefit of the testator's children. This was made the subject of a special case.

Mr. *Follett* and Mr. *Edward Smith* for the Plaintiff, *Jane Gurney Fox*, argued, that she took absolutely, subject only to a moral obligation to bring up and provide for her children. They cited *Reeves* v. *Baker* (*a*). Mr.

(*a*) 18 *Beav.* 372.

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Mr. *C. Hall* for the children, argued that there was, upon the authorities, a precatory trust in their favor. He cited *Gully* v. *Cregoe* (*a*); *Ware* v. *Mellard* (*b*). The cases of *Crockett* v. *Crockett* (*c*), and *Raikes* v. *Ward* (*d*), were referred to by the Court during the argument.

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I am clear that no precatory trust arises in this case; it is not, however, necessary to go through the authorities, which are not all perfectly reconcilable, but they all establish that the subject matter must be certain, and the objects to take must be clearly defined.

Here the testator intends to give his property absolutely to his wife, and he intended, at the same time, to give her a clear intimation of his wishes, but as to which she was to be considered under a moral, and not under any legal obligation.

(*a*) 24 *Beav.* 185.
(*b*) 16 *Jur.* 492.
(*c*) 1 *Hare*, 451; 2 *Phillips*, 553.
(*d*) 1 *Hare*, 445.

NOTE.—*See Longmore* v. *Elcum*, 2 *Y. & Coll. C. C.* 363.

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July 15, 25.

A promissory note, payable to order, may be the subject of a *donatio mortis causâ*, and will pass thereby, though unindorsed.

THE testatrix, *Frances Veal*, died on the 29th of *March*, 1858. She possessed two promissory notes for 60*l.* and 120*l.*, both of which were in the following form:—

"*Box, March* 17th, 1852.

"On demand, I promise to pay to Miss *Frances Veal or order* the sum of 60*l.*, with lawful interest for the same. For value received.

"*Catherine Rowe.*
"*Elizabeth Noble.*
"£60. "*Thomas Noble.*"

Shortly previous to her death, being told by her medical attendant that her complaint would terminate fatally, she delivered over the two promissory notes, unindorsed, to her niece, *Mary Maslen*, by way, as was alleged, of a *donatio mortis causâ*. *Mary Maslen* retained them down to the death of the testatrix, and now claimed the amount.

The validity of this gift was contested, on the ground that a promissory note payable to order, and not indorsed, could not be made the subject of a *donatio mortis causâ*.

Mr. *R. Palmer* and Mr. *Southgate*, for *Mary Maslen*. The decision of Sir *Joseph Jekyll* in *Miller* v. *Miller* (*a*), that a note not payable to bearer could not be the subject of a *donatio mortis causâ*, because "no property therein

(*a*) 3 *Peere Williams*, 356.

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therein could pass by delivery," and that of Lord *Hardwicke* in *Ward* v. *Turner* (*a*), as to receipts for *South Sea* Annuities, took place at a time when the law on the subject had not been settled. It was then thought, and it continued to be so considered down to the case of *Duffield* v. *Elwes* (*b*), that "where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causâ*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator." Sir *John Leach*, in that case, held that a mortgage would not pass as a *donatio mortis causâ*, by delivery of the deed, nor a bond held as a collateral security for the mortgage money; but that case was reversed by the House of Lords (*c*). The ultimate decision shews, that the fact of the property not passing, and that the executor must sue, does not affect the question. Lord *Eldon* (*d*) points out that Sir *J. Leach* had proceeded upon a misapprehension; he says, "nothing can be more clear than that this *donatio mortis causâ* must be a gift made by a donor in contemplation of the conceived approach of death, that the title is not complete till he is actually dead, and that the question, therefore, never can be, what the donor can be compelled to do, but what the donee, in the case of *donatio mortis causâ*, can call upon the representatives, real or personal, of that donor to do."

Lord *Eldon* subsequently repeats the same doctrine. He says (*e*), "I apprehend that in a case where a *donatio mortis causâ* has been carried into effect by a Court

(*a*) 2 *Ves. sen.* 431.
(*b*) 1 *Sim. & St. p.* 245.
(*c*) 1 *Bli.* (*N. S.*) 497.
(*d*) *Page* 530.
(*e*) *Page* 534.

Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that the donee has a right to call on a Court of Equity, and as to the personal estate, to compel the executor to carry into effect the intention manifested by a person he represents."

A bond, though a chose in action, may be made the subject of a *donatio mortis causâ*; *Snellgrove* v. *Baily* (*a*); and the donee may use the name of the executor to recover the debt; *Gardner* v. *Parker* (*b*). So the delivery of a receipt for money may constitute such a donation, *Moore* v. *Darton* (*c*), or of a cheque, *Bouts* v. *Ellis* (*d*). The same principle must apply to other choses in actions as bills of exchange and promissory notes. The property in these promissory notes passed even at law; *Barton* v. *Gainer* (*e*).

In cases of such gifts there is no intention to pass the property; because if the donor recovers, the property is intended to remain in him. It was, therefore, a proper course not to indorse these promissory notes.

They also referred to *Jefferys* v. *Jefferys* (*f*); *Byles on Bills* (*g*).

Mr. *Selwyn* and Mr. *Locock Webb*, for the Plaintiff, argued, first, that the acts of the testatrix shewed that she only intended a gift *inter vivos*. Secondly, that the promissory notes, not having been indorsed, could not be made the subject of such a gift. That this was not like the case of a chose in action, which could only pass

(*a*) 3 *Atk.* 214.
(*b*) 3 *Madd.* 184.
(*c*) 4 *De G. & Sm.* 517.
(*d*) 17 *Beav.* 121.
(*e*) 3 *Hurl. & N.* 387.
(*f*) *Craig & Ph.* 138.
(*g*) *Page* 330 (*7th ed.*)

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pass in equity; but one in which a legal right would have been acquired by the donee by an indorsement, and, therefore, that the act of the donor was not complete, as pointed out in *Bligh* (*a*).

In *Byles on Bills* (*b*) this is stated to be the result of the law:—"But the gift of a cheque drawn by the donor upon his banker, or of a promissory note not payable to bearer, will not amount to a *donatio mortis causâ*, and will have no contrary effect in equity than at law."

A mere verbal gift of a chattel does not pass the property, *Shower* v. *Pilch* (*c*), and therefore the notes themselves do not belong to the claimant.

They cited *Tate* v. *Hilbert* (*d*); *Gardner* v. *Parker* (*e*); *Reddel* v. *Dobree* (*f*).

Mr. *Lloyd* and Mr. *T. E. Lloyd*, for the Defendant, the executor, said, that they thought it right to refer the Court to a case of *Rankin* v. *Weguelin*, stated in *Chitty on Bills* (*g*), which appeared to decide this case.

That case is stated as follows: "*Rankin* v. *Weguelin* (*h*). In this case, a husband, in contemplation of death, delivered certain bills of exchange payable to his order to his wife, for her own use, but did not indorse them. The husband, believing that he could not live many days, gave the bills to his wife, saying, 'Take them for your own use and benefit.' The husband died within a fortnight

(*a*) *Vol.* 1 (*N. S.*), *p.* 530.
(*b*) *Page* 150 (*7th ed.*)
(*c*) 4 *Exch. Rep.* 478.
(*d*) 2 *Ves. jun.* 111.
(*e*) 3 *Madd.* 184.
(*f*) 10 *Sim.* 244.
(*g*) *Page* 2 (*9th ed.*), *but omitted in the* 10*th ed. See post*, 309.
(*h*) *Rolls Court*, 14*th June*, 1832, *MS.*

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a fortnight of the delivery of the bills. The executors took the bills from the wife, and received the payment of them when at maturity. The question was, whether they were subjects of gift by way of a *donatio mortis causâ*; and it was urged, that a chose in action could not be so given. His Honor said the contrary doctrine had been well established since the time of Lord *Hardwicke's* opposite decision, and he held that the executors were trustees for the wife, and relied on the case of *Duffield* v. *Hicks*" (*a*).

The MASTER *of the* ROLLS thought it proper that a search should be made in the registrar's office for the particulars of the case of *Rankin* v. *Weguelin* (*b*).

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July 25.

The question in this case is, whether a testatrix has made a good *donatio mortis causâ* of two promissory notes payable to the testatrix "*or order*," she not having indorsed them. It is solely a question whether such a donation is really good, and if anything more remains to be done by the donor; the state of the authorities is by no means satisfactory. The earlier authorities point very distinctly in one direction, as *Miller* v. *Miller* (*c*); *Ward* v. *Turner* (*d*). Lord *Hardwicke* extended the doctrine to a bond, but he said he would go no further. Then comes the case of *Duffield* v. *Elwes* (*e*), in which Sir *John Leach* laid it down, that the same principle which applied to voluntary gifts *inter vivos* was applicable to donations *mortis causâ*, and that if, in the case of a *donatio mortis causâ*, something more remained to be done

(*a*) 1 *Bligh's Rep.* (*N. S.*) 497; 1 *Dow. & Cl.* 1.
(*b*) *See post*, p. 309.
(*c*) 3 *Peere Williams*, 356.
(*d*) 2 *Ves. sen.* 431.
(*e*) 1 *Sim. & St.* 239; 1 *Bligh* (*N. S.*) 497.

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done by the deceased person, which this Court would not have compelled him to do in his lifetime, it could not be a good *donatio mortis causâ* after his death. Lord *Elden* came to an opposite conclusion, but he does not appear to have overruled the former decisions; and in that state of the authorities, it becomes very embarrassing to ascertain what the state of the law now is.

I have gone through the cases and some notes of a case not reported, but which is to be found in *Chitty on Bills*, namely, *Rankin* v. *Weguelin*. I thought that case extremely important, because it is stated that the bills were payable to order, and I find that the registrar's book fully bears out the conclusion stated in *Chitty*. It appears from the papers that the bills were drawn on the *East India Company* in favor of Colonel *Weguelin* or order, and were accepted; but it does not appear, from the papers, whether they were endorsed by Colonel *Weguelin*. Shortly before Colonel *Weguelin's* death, he gave them to his wife. The Master, in taking the accounts, included them in the outstanding estate of the testator, and the widow took an exception to his report. It was heard on the 7th of *June*, 1832, and it appears beyond all doubt, that the case was argued. The registrar's note-book states, that Mr. *Bickersteth* opened the exception, and that Mr. *Pemberton* and Mr. *Rolfe* were heard in favor of the report, and that several affidavits were read. The Court took time to consider, and on the 14th of *June*, judgment was delivered by Sir *John Leach*, who allowed the exception and made a declaration that there was a good *donatio mortis causâ*.

It is, therefore, precisely the point which arises in the present case, and as it is a decision of Sir *John Leach*, whose decision in *Duffield* v. *Elwes* was overruled by the

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the House of Lords, and who, therefore, must have considered that the decision of the House of Lords had settled the question, I feel bound by it. I also think it a much more healthy state of the law, that the validity of such a gift should not depend on whether the testator had written his name on the back of the bill or not, if it be clear that he intended to give them. I will, therefore, make a declaration, that the two notes passed to *Mary Maslen*.

RANKIN *v.* WEGUELIN.

Before Sir *John Leach*.

1829. *June* 2.

1832. *June* 7, 14.

The gift of bills of exchange payable to the donor or order, by way of a *donatio mortis causâ*, supported.

COLONEL *Weguelin* died on the 23rd of *May*, 1828, and the three Plaintiffs were his executors.

The Defendant, his widow, claimed three bills of exchange under a gift to her by way of *donatio mortis causâ*. On the 2nd of *June*, 1829, the ordinary administration decree was made, containing a reference to the Master to inquire under what circumstances the three bills of exchange or promissory notes, amounting together to 300*l*., had been given by the testator to Mrs. *Weguelin*.

Master *Farrer* made his report on the 15th of *March*, 1832, in which he included the three bills amongst the outstanding estate, and he found as follows:—A fortnight before the death of the testator, *Mary Weguelin* was in attendance upon him, when he desired her to give him a bundle of papers from his private drawer, in which he was accustomed to keep papers of importance, and, upon her doing so, he selected, out of such bundle of papers, the three bills of exchange for 124*l*. 12*s*. 8*d*., and 124*l*. 12*s*. 8*d*., and 62*l*. 10*s*., before mentioned, and having noted in pencil when they would fall due, the testator

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testator placed them in her hands, and in a very emphatic manner said to her, "My dear *Mary*, I give them to you—remember to send them for payment when due;" the testator being under the apprehension of death and thereby meaning, as *Mary Weguelin* submitted, to give the bills to her for her own use and benefit in case he should die. And he found that *Mary Weguelin*, having so received the said bills, held and kept them in her own possession until after the death of the testator, and she received the amount of the bills as and when the same became due through her bankers. And he also found that *Mary Weguelin*, on or about the 30th of *October*, 1828, paid the sum of 311*l.* 15*s.* 4*d.*, the amount and produce of the three bills, to the Plaintiffs, the executors of the said testator, but expressly without prejudice to her claim thereto.

These bills were in the following form:

"*Fort William*, 30th *June*, 1827.

"£124: 12*s.* 8*d.*

"At twelve months after date of this our first of exchange (second and third of same tenor and date not being paid), pay or cause to be paid unto *Lieut. Col. Thomas M. Weguelin or order* the sum of pounds sterling One hundred and twenty-four, twelve shillings and eight pence, in satisfaction of interest on 6 per cent. Promissory Notes of the *Bengal* remittable debt.

"Signed by order of the Governor General in Council,

"*H. J. Princep*,

"Acting Secretary to the Government.

"To the Honorable the Court of Directors for affairs of the Honorable United Company of Merchants of *England* trading to the *East Indies*.

"*London*,

"Accepted by Order of the said Court,

"*J. Dart*, Secretary."

The

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The Plaintiff Colonel *Rankin* (who was an executor) in his affidavit stated, that a few days after the testator's death, Mrs. *Weguelin* delivered the three bills into his hands, and "asked his advice as to the course proper for her to pursue with regard to the bills, and he advised her to pay the same into her bankers to be received when due, and *Mary Weguelin* acquiesced in such advice, and deponent, at her request, carried the said bills to Messrs. *Coutts and Co.*, the bankers of *Mary Weguelin*, and paid in the same to her account. And he said, that the amounts of the bills were received by Messrs. *Coutts and Co.* for the account of *Mary Weguelin* (*a*); but it was afterwards agreed between *Mary Weguelin* and the deponent and the executors of the testator *Thomas Matthias Weguelin*, that she should pay over the amount of the bills to the executors, to be held by them, without prejudice to her rights, until the hearing of this cause, and accordingly *Mary Weguelin*, on or about the 28th of *October*, 1828, paid the amount of the three bills (being 311*l.* 15*s.* 4*d.*) to the said executors."

Mary Weguelin took an exception to the report, for that the Master had included the three bills as part of the testator's personal estate not specially bequeathed. "Whereas the Master ought not to have included the said bills in such schedule; but ought to have allowed the Defendant to retain the same three bills of exchange, or the amount thereof, for her own proper use and benefit as having been a *donatio mortis causâ* to this Defendant."

The

(*a*) It did not appear from the papers in the Registrar's or Master's offices whether the bills had been indorsed by Colonel *Weguelin* or by his executors.

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The exceptions were heard before Sir *John Leach* on the 7th of *June*, 1832.

Mr. *Bickersteth* for Mrs. *Weguelin.*

Mr. *Pemberton* and Mr. *Rolfe* for other parties.

Sir *John Leach* (M. R.) reserved judgment.

1832.

June 14.

Sir *John Leach* (M. R.) allowed the exception and declared "that the gift of the three bills of exchange was a good *donatio mortis causâ*, and that the Defendant was entitled to the amount thereof for her own use," and he ordered the amount to be paid to her out of the funds in Court (*a*).

(*a*) *Reg. Lib.*, *B.* 1831, *fol.* 2385.

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July 26, 27.

Principles on which Courts of Equity proceed, in ordering the delivery up of instruments on which actions at law may be brought.

A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment, the Plaintiffs were *non pros'd.* *Held*, that, although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence.

ELIZABETH MACDONALD assigned her household furniture, pictures, &c. to the trustees of her husband's will, by way of indemnity. She afterwards became considerably indebted, and five of her creditors, viz. *Joel*, Messrs. *Wright*, *Nerwich*, *Lazarus* and *Marcus* obtained judgments against her. Executions issued upon these judgments, and her household furniture, pictures, &c. were seized by the sheriff and advertized for sale on the 15th of *February*, 1855.

The trustees of her husband's will immediately gave notice of their bill of sale to the sheriff.

The Plaintiffs *Cooper* and *Matthews* (Mrs. *Macdonald's* sons in law), and her sons, were anxious to prevent a forced sale of the property, and they entered into negociations with Messrs. *Wright*, who were both judgment creditors and acted as the solicitors of the other judgment creditors, to prevent it.

Ultimately, terms were arranged between them, and on the 15th of *February*, 1855, the Plaintiffs and the three other persons signed a memorandum, dated the day previous, which was in the following terms :—

" In consideration of Mr. *Joel consenting to postpone the*

Where a case stands over in order that a party may proceed at law, and he neglects to do so, the Court treats the case as if the legal right had been decided against him.

Upon the eve of a sale by the sheriff, *A. B.* (a stranger) agreed to guarantee the judgment debts, upon the judgment creditor " consenting to postpone the sale under the execution." It turned out that the consent of another party was necessary in order to prevent the sale, and in consequence the sale took place. *A. B.* gave notice, that the consideration having failed, the guarantee was at an end. *Held*, that *A. B.* was not liable under the guarantee.

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the sale under the execution against Mrs. *Elizabeth Macdonald*, and assigning his claim thereunder as we shall request, and in consideration of his and the other creditors under named taking payment of their debts as hereinafter mentioned, we jointly and severally undertake to guarantee the payment of the several debts owing from *Elizabeth Macdonald* by three equal instalments, at twelve, twenty-four or thirty-six months from the date hereof, with interest at 5*l.* per cent. *per annum*, viz. Mr. *Joel*, 2,720*l.*; *E.* and *H. Wright*, 4,300*l.*; *Abraham Nerwich*, 500*l.*; *E. Lazarus*, 650*l.*; Mr. *Marcus*, 600*l.* And we also jointly and severally agree with each creditor to execute a bond for securing the same on request. A satisfactory policy, if possible, to be effected on Mrs. *Macdonald's* life, and kept up and the policy deposited with Mr. *Joel* as further security. Dated this 14th *February*, 1855.

" *C. H. Macdonald.*
" *J. Cooper.*
" *H. W. Matthews.*
" *E. Macdonald.*
" *T. Macdonald.*"

Immediately upon this memorandum being signed, the Plaintiff *Cooper*, accompanied by *Wright*, went to the auctioneer, who had then sold a few lots, and directed him to discontinue the sale, but the auctioneer declined to do so, stating that he was acting under the authority of the sheriff, and could not act on *Wright's* instructions. The Plaintiff *Cooper* and *Wright* then went to the undersheriff, who, however, said he could not stop the sale without the authority of the trustees, who he said claimed the goods, and consequently the sale went on, and none of the executions were, in fact, withdrawn. Thereupon the Plaintiff's solicitor, Mr. *Reece*, on the same 15th day of *February*, served upon *Wright*, on behalf of himself and

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and the other judgment creditors, a notice that the arrangement made with them that morning, and the agreement or undertaking the Plaintiffs then signed, "had become null and void, inasmuch as the consideration for which they were induced to enter into such arrangement and to sign such agreement had failed, and that the said parties would not hold themselves bound thereby," and requiring him to deliver up the agreement or undertaking in order that the same might be forthwith cancelled.

The auction proceeded, and the whole of the property was sold.

The five judgment creditors, in *February*, 1856, brought five several actions against the Plaintiff *Cooper*, upon the guarantee, to recover the first instalment on their debts.

Cooper and *Matthews* instituted this suit against the five judgment creditors and the three other sureties, alleging that the guarantee or memorandum was signed and given by the Plaintiffs in consideration of and upon the faith that the said sale should not be commenced, or, if begun, that it should be discontinued the instant the same was signed, that the consideration for the same had failed, and that the same had become inoperative and void.

The bill prayed, that the guarantee of *February*, 1855, might be declared to be inoperative and void, and that the same might be cancelled, and that the Defendants might be restrained from proceeding upon it at law against the Plaintiffs.

A motion was made on the 18th of *November*, 1857, for

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for an injunction to stay those proceedings, which was ordered to stand over until after the trial of the five actions. On the 12th of *April*, 1859, judgment of *non pros*, for not proceeding to trial after notice, was signed in each of the five actions.

The cause now came on for hearing.

The Defendant *Wright* filed an affidavit, stating that the Plaintiff *Cooper* had gone out of business in consequence of pending liabilities. It specified a number of bills of sale given by him, and stated that he, *Wright*, believing that *Cooper*, in case of a verdict going against him, would not or could not pay, but would take the benefit of the Insolvent Act, had determined himself and advised the other parties to the guarantee not to prosecute the actions for the present. That thereupon judgment of *non pros* was signed.

Mr. *R. Palmer* and Mr. *Hardy* for the Plaintiffs.

Mr. *Speed* for the Defendants.

Simpson v. *Lord Howden* (*a*); *Hayward* v. *Dimsdale* (*b*); *Ryan* v. *Mackmath* (*c*) were cited.

The MASTER *of the* ROLLS.

July 27. After reading the evidence very carefully I have come to the conclusion that the Plaintiff is entitled to a decree. It was, in the first place, contended, on behalf of the Defendants, that the Court had no jurisdiction to order

(*a*) 3 *Myl. & Cr.* 97.
(*b*) 17 *Ves.* 111.
(*c*) 3 *Bro. C. C.* 14.

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order the instrument in question to be delivered up; but I am of a different opinion. The principle upon which the Court orders a legal instrument to be delivered up is well expressed in *Simpson* v. *Lord Howden* (*a*), and the authorities there cited. That principle may be thus stated:—If a legal instrument has stated on the face of it the defect which makes it impossible to sue at law, this Court will not interfere; but, if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at law upon it, or if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument from loss of the evidence necessary for his defence at law to be unable to make available, then this Court will interfere and order the instrument to be delivered up to be cancelled. To use the words of Lord *Cottenham* (*b*), the Court orders such documents to be delivered up in consequence of "the danger that the lapse of time might deprive the party to be charged upon it of the means of defence." I am, therefore, of opinion that the Court has jurisdiction in this case, because there is no legal defect apparent on the face of this guarantee.

The next question upon the hearing of the case is this:—This is a bill to restrain an action brought upon a guarantee. I was of opinion, upon the hearing of a motion for an injunction, that the question depending upon matters of fact would be much better tried at law than in equity, and accordingly, on the 18th of *November*, 1857, I directed the motion to stand over until after the trial. This cause is now brought on in *July*, 1859, about a year and a half after that time. The Plaintiffs in the actions at law have not thought

(*a*) 3 *Myl. & Cr.* 97. (*b*) *Ibid.* 102.

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thought fit to proceed with them and they have been *non pros'd*, which is equivalent to the dismissal of a bill for want of prosecution. I must treat that as a verdict against them. In this Court, when there is a question to be tried at law, the Court orders the cause to stand over for a year, with liberty to the party to bring such action as he may be advised, and if he do not proceed at law, the Court determines the case as if the action had been brought and decided against him. The Defendants say, it was useless to proceed in the actions, as three bills of sale had been registered against the Plaintiff *Cooper*, and they add that if they had proceeded and had recovered judgment, it would only have driven *Cooper* through the Insolvent Court. I think this Court cannot go into the question of the greater or less degree of solvency of the Plaintiff; it must determine upon the facts, and the Defendants having had an opportunity of trying the action, and having failed to do so, it must be considered as if it had been tried and decided against them.

I have considered it my duty to read and consider the evidence, for I thought that it might not be satisfactory to the parties, if I were to determine the case as if there had been a verdict against the Plaintiffs at law, I have, therefore, read and considered the evidence, and upon that evidence I think the Plaintiff is in the right.

The case is this:—There were five executions upon five judgments, and the sheriff who had taken possession of the lady's property, which was considered of great value, was about to sell it. The Plaintiffs and three other persons went to the execution creditor and said "we will give you a guarantee for the debts, payable by instalments, provided you consent to stop the sale," and thereupon the execution creditor did consent.

But

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But, when they came to the auctioneer, it appeared that their consent was not sufficient to stop the sale, and that it required the consent of other persons. Accordingly, the auctioneer did not stop the sale, and two hours later, on the same day, the persons who had given the guarantee gave notice that as the sale was going on the guarantee was at an end. Now the first question is what were the rights of the parties? I am of opinion that the guarantee was at an end, and that it is impossible to say that the guarantee was to be given in case the execution creditor consented to stop the sale, although such consent was ineffectual to produce the object for which it was given. The common sense and *bona fides* of the transaction is, provided they could, by means of such consent, stop the sale. The guarantee proceeded upon a common understanding between them, that the consent would be effectual for that purpose. The object was to stop the sale, not to make the execution creditor utter some unmeaning words. Accordingly, I think that being unable to stop the sale, the notice given by them that the guarantee was at an end was effectual.

Evidence was gone into to shew that the agreement was revived on the following day, and that the sale was allowed to proceed for the next five days, in consequence of the Plaintiffs being of opinion that the property, so far from being sacrificed, was selling beneficially. But after reading the evidence, I am satisfied that no fresh agreement was come to, and that the first agreement was put an end to when the notice was given.

In that state of circumstances, I think that the Defendants could not succeed at law, and that this would have been a good defence to the actions. But, as the case which is made by the Defendants, upon the

 affidavits,

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affidavits, confessedly or professedly is, that the proceedings at law are only suspended, as they say "for the present," their argument being, that they may sue again upon a fresh instalment under the guarantee becoming due, I am of opinion (referring again to the principle laid down by Lord *Cottenham* in the case I have referred to) that as lapse of time might deprive the Plaintiffs chargeable upon this document of the means of defence, and as the Defendants may hold it, and profess to hold it, for the purpose of suing at a future time, this Court ought to interfere and direct it to be delivered up.

Therefore I must make a decree to that effect, and the costs must follow the event.

NOTE.—Affirmed by Lord *Campbell*, L. C., 17th *Dec.* 1859.

BAKER *v.* RICHARDS.

July 18.

A testator bequeathed his personal estate to his wife absolutely, and he devised two real estates to her for life, and after her death, on trust for sale and division amongst other parties. Having sold one of the estates, he made a codicil changing his trustee, and authorizing the sale of the remaining estate at any time, and he gave the produce thereof to his wife for life, and then "upon the trusts and for the intents and purposes in his will expressed and declared as concerning all his real and personal estate; and in all other respects he confirmed his will. *Held*, that the produce of the estate was not divisible amongst all the devisees and legatees rateably, but was subject to the trusts declared by the will.

BY his will dated in 1844, the Rev. *John Lloyd* devised his real estate at *Hindolveston* and *Burney*, in *Norfolk*, to *Goodwin* in fee, in trust for his widow, *Elizabeth Lloyd*, for her life, and after her decease, in trust to sell, and hold one-fourth of the produce for his sister *Elizabeth Lewis* and her children, one-fourth for the children of his deceased brother *Francis Lloyd*, one-fourth for the children of his deceased brother *Edward Lloyd*, and the remaining one-fourth for the children of his deceased sister *Jane Richards*. After a specific bequest of furniture, &c., and a gift of a legacy to *Goodwin* for his trouble, the testator gave the residue of

of his personal estate to his wife absolutely, in case she survived him (which happened).

In 1848, the testator made a codicil, by which, after reciting his will, and that he had sold his *Burney* property and invested the produce, he appointed *Mason* to be trustee and executor in the place of *Goodwin*. He then proceeded thus :—

" I do hereby authorize and empower her, my wife, *Elizabeth Lloyd*, and *George Mason*, at any time after my decease, to sell and dispose of all or any part of my real estate at *Hindolveston*, in such manner as they shall think proper, and to convey the same to the purchaser or purchasers thereof, and in all respects to exercise the powers and trusts for effecting and completing any sale or sales which in my said will are expressed. And I do hereby declare, that the receipt or receipts of her my said wife, and the said *George Mason*, shall effectually discharge the person or persons paying any purchase-money to them. And I do hereby declare, that the said *George Mason*, his executors, administrators and assigns, shall stand and be possessed of the money that shall arise from such sale or sales as are hereby authorized to be made, upon trust to invest the same in the £3 per Cent. Consolidated Annuities or other securities, as they, in their discretion, shall think fit. And upon further trust, to permit and empower my wife to receive the dividends and interest of the funds and securities whereon the said moneys shall be invested during her natural life, and after her decease, shall stand and be possessed of the said funds and securities, and the dividends and interest of the same, *upon the trusts and for the intents and purposes in my said will expressed and declared as concerning all my real and personal estate.* And I give and bequeath unto the said *George Mason* (instead of the said *Harvey Goodwin*) the sum of 40*l.* as an acknow-

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ledgment for his trouble in the execution of all the trusts of my said will, to be paid to him clear of deduction for legacy duty within twelve months after my decease; and, in all other respects, I confirm my said will."

The testator, *John Lloyd*, died in *July*, 1848.

After his decease his widow and *Mason* sold the *Hindolveston* estate, and the produce was invested in 766*l.* Consols.

The widow died in 1854, and the Plaintiff, who was interested under her will, instituted this suit, praying that the rights of all parties to the produce of the *Hindolveston* estate might be ascertained and declared.

Mr. *R. Palmer* and Mr. *Beavan* for the Plaintiff, argued, that as the produce of the *Hindolveston* estate was bequeathed upon the trusts declared in the will concerning all the real and personal estate, the produce ought to be divided rateably between the devisees and legatees. That a contrary construction would require the words "all" and "personal" to be struck out of the will.

Secondly. That the produce had been converted into personalty, and passed under the residuary bequest to the widow.

Mr. *Lloyd*, for the children of the testator's brothers, *contrà*, argued, that the testator merely intended the produce of the one estate to be subject to the trusts which he had declared as to both, and he pointed out the difficulties which would arise in dividing the produce

duce rateably amongst all the persons taking under the will.

Mr. *Baggalay* for the heir.

Mr. *Wickens* for the trustee.

The MASTER *of the* ROLLS.

I think the codicil must be treated as a continuation of the will. I am satisfied that the testator never intended to apportion the produce of the *Hindolveston* estate between all the persons taking benefits under his will. It is very obscure, and I must take a common sense view of it. I think the produce of the *Hindolveston* estate is subject to the same trusts as those declared respecting it in the will, but as there is an intestacy as to one-fourth, it will go to the heir at law.

NOTE.—*See Hindle* v. *Taylor*, 20 *Beav.* 109, *and* 5 *De G., M. & G.* 577; *Baskett* v. *Lodge*, 23 *Beav.* 138.

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Re BROWNE'S WILL.

July 29.

Bequest of Consols, in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity, for her maintenance, support or otherwise for her personal benefit. The legatee being unmarried, *Held* that she was entitled to a transfer of the Consols.

THE testator bequeathed to his three trustees, who were also his executors, the sum of 3,000*l.* £3 per Cent. Consolidated Annuities, upon trust to invest the same in the purchase of a government annuity, or if from any cause a difficulty should arise as to the purchase of a government annuity, then in an office for the insurance of life, or in some other good security, to be payable during the life of *Louisa Harris;* and to be held upon trust to pay the same unto *Louisa Harris* for her sole and separate use, free from the debts or control of any husband, and so that she should not anticipate the same. And he declared that her receipt should be a discharge for the same, but that in case of illness or other incapacity of *Louisa Harris* to give such receipt, it should be lawful for his trustees, in their discretion and of their uncontrollable authority, to dispense with the same, and to manage the said annuity, and from time to time to apply the same for the maintenance and support, or otherwise for the personal benefit of *Louisa Harris*, during her life, at such times and in such manner as his trustees should think most conducive to her comfort and convenience.

Louisa Harris, who was unmarried, being advised that she was entitled to have the 3,000*l.* Consols transferred to her, instead of the annuity directed to be purchased therewith, elected to have the sum of Consols transferred to her instead of the annuity, and she gave the executors notice requiring them to transfer it to her. They refused so to do, and paid the amount into Court under the Trustee Relief Act.

Louisa

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Re BROWNE'S WILL.

Louisa Harris now presented a petition, praying a declaration that she was entitled to the 3,000*l.* Consols, and that it might be transferred to her accordingly.

Mr. *Selwyn* and Mr. *Fischer* cited *Ford* v. *Batley* (*a*).

Mr. *Hobhouse* for the executors.

The MASTER *of the* ROLLS held that the Petitioner was entitled to have the Consols transferred to her.

(*a*) 17 *Beav.* 303.

CAMPBELL *v.* BOUSKELL.

July 20, 21.

A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as *M. F.* should appoint, and in default of such appointment, upon trust for "my aforesaid nephews and nieces and their respective lawful issue, and also the issue (if any) of *M. F.*, and their several and respective heirs and assigns for ever" as tenants in common. No nephews or nieces were mentioned in the will. *M. F.* died without appointing. *Held*, that there was no gift by implication to the grandchildren and their issue. Secondly, that the words "my aforesaid nephews and nieces" could not be read "my aforesaid grandsons and granddaughters." Thirdly, that the gift to the nephews and nieces was not void for uncertainty, and lastly, that they took in tail.

THE testatrix died in 1841, she had an illegitimate daughter, *Ann Fell*, who had seven children, viz. *Mary Fell*, *James Fell*, *John Fell*, *Samuel Fell*, *Ann Campbell*, *Margaret Ashburner* and *Eliza Coward*. Some of these had children then living.

The testatrix at her death had one nephew, *James Bouskell*, and one niece *Margaret Ashburner*; and she had had another nephew (*James Proctor*), who had died in 1825, leaving two children, *John Proctor* and *Ann Ireland*.

The testatrix, by her will dated in 1837, devised her real estate to two trustees in fee, upon trust for her daughter *Ann Fell* for life, and afterwards for her "granddaughter" *Mary Fell*, for life, and then upon the

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the trusts following:—Upon trust "for all and every the lawful issue, if any, of my said granddaughter, and my grandsons, *James Fell, John Fell* and *Samuel Fell*, and their respective issue, and my granddaughters, *Ann Campbell, Margaret Ashburner* and *Eliza Coward*, and their respective lawful issue, for such estates," &c., &c., "as she, my said granddaughter *Mary Fell*," shall by will appoint, "and in default of" any such appointment, then upon trust that the trustees should "stand and be possessed thereof, for the use and benefit of my *aforesaid nephews and nieces* and their respective lawful issue, and also the issue (if any) of my said granddaughter *Mary Fell*, and their several and respective heirs and assigns for ever, nevertheless not as joint tenants, but as tenants in common."

The testatrix had not named any nephew or niece in her will.

The testatrix died in 1841; *Mary Fell* died unmarried in *September*, 1857, and without having executed her power; and *Ann Fell* died in *October* in the same year, and thereupon difficulties arose as to who were entitled to the real estate.

Of the seven grandchildren, *Ann Campbell* died in 1848, leaving issue, but the other five grandchildren survived the tenants for life, and four of them had children.

The nephew, *James Bouskell*, died in 1852, and his son, *James Bouskell*, was heir to the testatrix.

The niece, *Margaret Ashburner*, had died in 1852 without issue.

The

The great nephew, *John Proctor*, and the great niece, *Ann Ireland* (the children of *James Proctor*, who had died in 1825), were still living.

The bill prayed that the rights of the parties might be declared. The cause now came on for hearing.

Mr. *W. Pearson*, for the Plaintiffs, argued, that the Defendants *James Fell*, *John Fell*, *Samuel Fell*, *Margaret Ashburner*, *Eliza Coward*, and the respective lawful issue of them and of *Ann Campbell* deceased, who were living at the death of *Mary Fell*, became and were now beneficially entitled equally between them to the real estate for estates in fee simple in possession.

First, because the power to appoint in favor of the grandchildren and their issue created an implied gift to them under the doctrine of *Brown* v. *Higgs* (*a*); *Jarman on Wills* (*b*). Secondly, because the testatrix, by the gift to her "aforesaid" nephews and nieces, (she not having previously mentioned any,) must have intended the persons she had previously named, that is, her grandchildren. He argued, that grandchildren might take under the description of nephews, which was one of the examples given of its meaning in *Johnson's Dictionary*, the word "Nephew" being derived from *Nepos*, a grandson.

Mr. *Fitzhugh*, in the same interest, referred to *Richardson's Dictionary*, "Nephew;" *Webster's Dictionary*, "Nephew;" *Timothy* (*c*), where the Greek word "ἔκγονα" was used in the same sense.

The

(*a*) 4 *Ves.* 708; 5 *Ves.* 495; 8 *Ves.* 561.

(*b*) *Vol.* 1, *p.* 461 (*2nd ed.*)

(*c*) 1 *Epist. c.* 5, *v.* 4.

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I am of opinion that it is impossible to read "nephews and nieces" as "grandsons and granddaughters." Where a testator uses the words "grandsons and granddaughters" in one part, and "nephews and nieces" in another part of his will, it is impossible to hold that he means the same persons, nor can the word "aforesaid" make any difference. It would be doing great violence to the words of a will.

Nor can it, in my opinion, be justified by reference to ancient authorities, which shew that, in some instances, when a man spoke of his grandsons and nephews he considered the expressions as equivalent.

The consequence is, that the case of the Plaintiffs fails, and the bill ought to be dismissed, as they have no interest in the estate.

Mr. *C. Hall*, for the Defendant *James Bouskell*, asked the Court to put a construction on the will.

He argued, first, that the gift was void for uncertainty, for it was to "my aforesaid nephews and nieces," and none were previously or subsequently mentioned. That the word "aforesaid" was necessarily a component part of the description and must be satisfied. Secondly, that if the Court decided in favor of the nephews and nieces, then that they took estates tail; and as *Margaret* died without issue, there was an intestacy, and that, therefore, *James Bouskell*, the heir at law, was entitled to the whole estate. That as *Margaret* had no issue, either at the date of the will or at the testator's death, the case came within *Wild's Case*

Case (*a*), for the issue could not take concurrently with their parents; and that if *Margaret*, one of the objects of the gift, took in tail, the other, *James*, must necessarily take the same estate.

Mr. *Dewsnap* for the younger children of *James Bouskell*, and for *John Proctor* and *Ann Ireland*.

The MASTER *of the* ROLLS.

This will is very obscure; but I think, in the first place, that the words "my aforesaid nephews and nieces" must mean "all my nephews and nieces." Suppose a testator had used these words alone in his will, viz.:—"I give all my real estate to my aforesaid nephews or nieces," would it be possible for this Court to hold that the testator died intestate? On the construction I put on this sentence yesterday, the word "aforesaid" has no meaning, and, in my opinion, it would be a strong thing to say that, because the testatrix has not specified the whole class, none are entitled. I think the whole of the nephews and nieces take. The class is to be ascertained at death of testatrix, and can only include persons who survived her and their lawful issue, and would exclude those who had predeceased her.

I can only read the subsequent words as words of limitation, and I think the nephew and niece took estates tail as tenants in common.

I must, therefore, make a declaration that the testatrix's nephew *James Bouskell*, and her niece *Margaret Ashburner*, in the events which have happened, took the hereditaments and real estate as tenants in common in tail, subject to the life interests of *Ann Fell* and *Mary Fell*, and that the remainder in fee was undisposed of by her will.

(*a*) 6 *Reports*, 170.

Re HARVEY.

August 1.

The Respondent (a solicitor) was appointed a member of a committee of a company, with power to compromise two suits. He, with the approbation of his co-committee, compromised them and received the money. A summary application that he might pay over the money or be struck off the rolls was refused with costs.

THIS was a petition presented against a solicitor of the Court, stating that in 1859, he had been appointed a member of a committee to investigate the affairs of a mining company, established and working under the cost-book system, called "*The Great Sheba Consols Mining Company;*" and that, as such member of the committee, he had power to compromise two suits brought on behalf of the said company against *Sergeant* and *Rattenbury*. That, with the approbation of two fellow committeemen, he had received from the Defendants respectively 50*l.* and 30*l.* in full satisfaction, but on behalf of the company, and to be accounted for and paid by him to the company or to the secretary thereof. That he refused to pay these sums, pretending that the company could not give him a proper receipt, and that, thereupon, the company offered that he should pay the money into Court in the name of himself and of Mr. *Vaughan Prance*, the solicitor of the company, to abide the decision of counsel, as to whether the company could give him a proper receipt, but that he refused either to accept the offer or pay the money to the company, or to any one on its behalf.

The Petitioner (the purser of the mining company) presented this present petition, praying that the solicitor might be ordered to pay the 50*l.* and 30*l.* to the secretary of the company, or that he might be removed from the rolls of the Court.

Mr. *Swanston, jun.*, in support of the petition, argued,

gued, that in a case of this description, it was the practice of the Court to proceed summarily against its officers, by ordering payment of moneys received by them. He cited *Re Aitkin* (*a*); *Hughes* v. *Mayre* (*b*); *Ex parte Grubb* (*c*); *Re Oliver* (*d*); and see *Tylee* v. *Webb* (*e*).

Mr. *Jessel contrà* was not heard.

The MASTER *of the* ROLLS.

This is a very novel petition; and if I acceded to it, I should expect a considerable number of similar applications. The case is nothing more than this:—A company appointed a solicitor and other members to be a committee to compromise two debts, and they accept 80*l.* from the debtors, which is received by the solicitor. The company then come here and ask that the solicitor may pay over the money or be struck off the rolls. If he has acted as the solicitor of the company, then by the ordinary mode of application to the summary jurisdiction of the Court, they may, by an order of course, get an account and an order on him to pay what is due from him. If he has not acted as the solicitor of the company, then it is either a simple case of assumpsit, where the money may be recovered at law, or it is a question of accounts between them to be taken in the usual manner. But here the Petitioner asks to strike a solicitor off the rolls unless he pays him 80*l.*, which he alleged to be due. This is the first application of the sort I have ever met with, and I must refuse it with costs.

(*a*) 4 *Barn. & Ald.* 47.
(*b*) 3 *Term Rep.* 275.
(*c*) 5 *Taunt.* 206.
(*d*) 2 *Adol. & Ell.* 620.
(*e*) 14 *Beav.* 14.

1859.

JACQUET *v.* JACQUET.

June 12, 15.

A testator charged his real estates with his debts, and he devised his *C.* plantation in trust to pay his debts. He died in 1834, and the produce of *C.* being in Court:—*Held*, in 1859, that the creditors were not barred as to the fund in Court, a trust having been created in their favor, but that they were barred as to the other real estates, they having a mere charge thereon.

THE testator was resident in *Jamaica*. He had two plantations called "*Content*" and "*Epsom*." By his will dated in 1832, the testator requested his executors to "pay and discharge his funeral expenses and all just and legal demands that might be against him," "with the payment of which (he said) I do charge and make liable all my property in *Jamaica* both real and personal," &c. "It is my desire, and I do hereby direct that my executors hereinafter named, or such of them as shall qualify under this my will, do dispose of the freehold of *Content* plantation, with the buildings thereon," &c. "the moneys arising from the sale thereof to be applied to the liquidation of my debts, and the overplus (if any) to fall into the residue of my estate. All the rest, residue and remainder of my property in *Jamaica*, but subject to the payment of my debts and legacies comprised of *Epsom* plantation," &c. &c., "and everything else on the plantation or elsewhere in *Jamaica*, of whatsoever nature and kind," he gave, devised and bequeathed to certain persons whom he named.

The testator died in 1834, and in 1843 the plantations were sold to *Philip Jacquet* and the money was in Court. The Chief Clerk found that a debt of 318*l.* was still due to *Spicer*, and that he had a claim to that amount on the trust funds. The question was, whether the real estate was charged with the debt, and whether his remedy against the estate and the produce was or not barred by the Statute of Limitations.

The

The Plaintiff took out a summons to vary the certificate by finding that he had no claim on the trust funds.

Mr. *Selwyn* and Mr. *Rudall*, for the Plaintiff.

Mr. *Bagshawe* and Mr. *Southgate*, for *Spicer*.

Mr. *Follett* and Mr. *F. S. Williams*, for *Philip Jacquet*.

Mr. *Horsay*, for *White* and wife.

Mr. *W. D. Lewis* and Mr. *Higgins*, for *Isabella Jacquet*.

Mr. *Selwyn*, in reply.

Dundas v. *Blake* (*a*); *Phillippo* v. *Munnings* (*b*); *Mountstephen* v. *Brooke* (*c*); 4 *Geo.* 2, *c.* 4 (*Jamaica Statute*); 29 *Geo.* 3, *c.* 13 (*Jamaica Statute*); 3 *&* 4 *Will.* 4, *c.* 27, *ss.* 25, 40; *Piggott* v. *Jefferson* (*d*); *Bright* v. *Larcher* (*e*); *Francis* v. *Grover* (*f*); *Beckford* v. *Wade* (*g*), were cited or referred to.

The MASTER *of the* ROLLS.

I think that this will created a trust for the payment of debts as regards the *Content* plantation; but with respect to the other plantation, there is a mere charge of debts. I am of opinion that the statute does not apply as regards the *Content* estate; but I wish to consider whether the transaction of 1843 amounted to a sale

(*a*) 11 *Irish Equity Rep.* 138.
(*b*) 2 *Myl. & Craig*, 309.
(*c*) 3 *Barn. & Ald.* 141.
(*d*) 12 *Sim.* 26.
(*e*) 27 *Beav.* 130.
(*f*) 5 *Hare*, 39.
(*g*) 17 *Ves.* 87.

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sale to Mr. *Philip Jacquet*, in consideration of his paying a sum of money into Court, because if it did, I am of opinion that the fund is affected by the trusts specified by the will, and is now applicable to the payment of the debts.

The MASTER *of the* ROLLS.

June 15. I came to the conclusion that the debts were charged on the whole of the property, but the trust was limited to the *Content* estate, which the testator directed to be sold by his executors, and the produce applied in payment of his debts. The testator died in 1834, and, under the Statute of Limitations, passed in 1837, the lapse of twenty years bars any power of recovery in respect of the charge, but it does not bar the right of recovery as regards the *Content* estate, as to which a trust was created.

I think the result of the transaction in 1843 is, that *Philip Jacquet* is the purchaser for value of the *Content* estate, and from that time the statute begins to run in his favor under the 25th section of 3 & 4 *Will.* 4, c. 27; but as against the produce of the *Content* estate, the statute does not apply, and it remains liable for the payment of the testator's debts. I cannot make out how much of the fund in Court is attributable to the *Content* estate, and that must be ascertained by an inquiry.

I will, however, make this declaration: — that so much of the money now in Court as is properly attributable to the purchase of the *Content* estate, under the deed of 1843, is applicable to the payment of Mr. *Spicer's* debt.

1859.

THRUSTON *v.* ANSTEY.

July 6.

Bequest of 1,000*l.*, the "interest" for *A.* for life, with power to dispose of the "principal" to her children by will, and if no will, then "the said legacy" to go to her children "at twenty-one years of age." *A.* died in 1840, and her only child attained twenty-one in 1858. *Held*, that he was entitled to the intermediate interest on the legacy.

BY his will, the testator bequeathed to the following effect:—I give, for the benefit of my nieces *Sarah Gaussen* and *Eliza Sotheby*, the sum of 1,000*l.* each, which legacies shall be retained by my executors and invested in £3 per Cents., "to the intent that the same respectively, as to the *interest* thereof, may be secured for their respective sole and separate use during their respective lives; and as to the *principal* thereof, that they shall respectively have power, by will or codicil, to dispose thereof to their respective children. And if no will or codicil, then that the *said legacies* shall go to their respective child or children equally, if more than one, *at twenty-one years of age.*" And in failure of children of either of the nieces, the survivor to have the benefit of the whole of the said "*legacies;*" "and that the *principal of the same* respectively may go to the child or children of the survivor of them, if any, at his, her or their age aforesaid. And if both my said nieces shall die without leaving a child or children who shall attain that age," then the principal of the said two legacies shall go to the personal representative of the survivor.

The testator died in 1827, and the legacies were set apart and invested by the executors. *Eliza Sotheby* died intestate in 1840, leaving one child (the Plaintiff), who attained twenty-one in the year 1858.

The Plaintiff instituted this suit for recovery of his legacy, and the only question was, whether he was

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THRUSTON v. ANSTEY.

entitled to the dividends thereon which accrued between the death of his mother (1840) and his attaining twenty-one (1858).

Mr. *Selwyn* and Mr. *Hardy* for the Plaintiff. The dividends which accrued between 1840 and 1858 pass to the Plaintiff. It is not a gift on a contingency, but a legacy set apart for the benefit of the niece, and after her death, that "legacy," with all the intermediate benefits, is given to her children; *Ridgway* v. *Ridgway* (*a*).

Mr. *Cole* for the executors. The gift to the children at twenty-one is contingent on their attaining that age, the general rule (*b*) is therefore applicable, that where legacies are given on a contingency, the intermediate interest falls into the residue; *Descrambes* v. *Tomkins* (*c*); *Wyndham* v. *Wyndham* (*d*); *Shawe* v. *Cunliffe* (*e*). The "principal" only is given.

The MASTER *of the* ROLLS.

I think there is no question on this will. The testator has given 1,000*l.* each for the benefit of his two nieces, and he divides the legacy into principal and interest. As to the interest, he gives it to the nieces for their separate use for life; as to the principal, he gives them power to dispose of it amongst the children. If no will, then the legacies (that is the principal and interest) is to go to their children at twenty-one years of age.

I think there can be no question that the Plaintiff is entitled

(*a*) 4 *De G. & S.* 271.
(*b*) 2 *Roper on Leg.* 1306 (*4th ed.*)
(*c*) 1 *Cox*, 133.
(*d*) 3 *Bro. C. C.* 58.
(*e*) 4 *Bro. C. C.* 143.

entitled to the whole of the interest realised during the time.

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The cases do not touch the point, there is no question that if there is contingent legacy, payable only on the happening of a particular event or at a particular time, it does not give the principal until that time, and consequently no previous interest.

The Plaintiff here must have the legacy with interest and costs of suit.

Re HUE'S TRUSTS.

June 16.

Trustees, on paying a fund into Court, under the Trustee Relief Act, retained a sum for their costs. On a petition to obtain the fund out of Court, the trustees obtained the costs of their appearance, but all their costs were ordered to be taxed.

UNDERWOOD and *Richardson* held a sum of 164*l.* 7*s.* 3*d.* £3 per Cents. and 7*l.* 7*s.* 9*d.* on trust. They retained 38*l.* 19*s.* in discharge of costs alleged to have been incurred by them as trustees, and they paid the residue into Court under the Trustee Relief Act.

The Petitioner Mrs. *Hue*, who was entitled to the fund, presented a petition for payment of it to her.

Mr. *W. Morris*, in support of the petition, argued that the costs which the trustees had retained ought to be taxed.

Mr. *Hallett*, for the trustees, asked for their costs of the present petition, but resisted the taxation of the costs which had been retained.

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The trustees may have their costs of the present application, but they must be taxed, together with their

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Re HUE'S TRUSTS.

costs, charges and expenses properly incurred by them in relation to the fund, and, on the other hand, they must be charged with the 39*l.* already retained by them on account of these costs.

STREATFEILD *v.* COOPER.

June 30.
July 1, 13.

Copyholds held to pass under a will by the words "moneys, property and effects," aided by the context.

A will commenced with a statement that it was a disposition of the testatrix's "estates, property and effects." The testatrix then gave and "bequeathed" her "moneys, property and effects" to her daughters, with an ultimate limitation to her own next of kin. The disposition pointed to personal estate, there was a direction to invest, the words "devise" and "heirs" were not used, and the expressions "legacy," "capital and principal" were applied to the gift. There being a trust for conversion,—*Held*, that copyholds passed under the gift to the children.

THE testatrix, *Charlotte Anne Streatfeild* (widow), was absolutely entitled to 5,000*l.* under the will of Mr. *Rhodes*, and she had, under her marriage settlement and the will of her father, power to appoint two sums of 25,000*l.* and 2,000*l.* amongst her children. She was also seised of a copyhold estate of inheritance, and possessed of other personal property of her own.

She made her will in 1858, which commenced thus:—I, *Charlotte Anne Streatfeild*, widow, "do make and declare this alone to be my last will, testamentary appointment and disposition of the *estates, property and effects* over which I have any power of disposition in manner hereinafter mentioned." She then recited the will of *Rhodes*, her marriage settlement and her father's will, that she had three children, and that her deceased husband had made ample provision for their only son *Richard James*, but had left their two daughters, *Anne Charlotte* and *Marian Gertrude*, wholly unprovided for, whereby it had become her duty to provide for them out of her property. The will proceeded:—"Now I, the said *Charlotte Anne Streatfeild*, as to the said sum of 5,000*l.*, and as to *all other moneys, property and effects* to which I may be *entitled* at the time of my

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my death and to which the hereinbefore recited powers of appointment or either of them do not extend, do hereby direct, that all my just debts and funeral and testamentary expenses be paid thereout, as soon as can be after my decease. And as to the residue of such *my property*, I do hereby declare it to be my will," and as to the sums of 25,000*l.* and 2,000*l.*, I do hereby appoint, "*that all the said moneys, property and effects*, of whatever kind, and from whatever source derived, shall be divided amongst my said three children in manner following (that is to say): I give, bequeath and appoint to my dear son *Richard James*," 100*l.* sterling. "And subject to the said legacy, I give, bequeath and appoint to each of my said dear daughters, *Anne Charlotte* and *Marian Gertrude*, in case they shall respectively attain the age of twenty-one years or shall marry, whichever may first happen, one equal moiety or half part of the entire residue of the said *moneys, property and effects*." She directed the shares of her daughters to be invested, as regarded the 25,000*l.* and 2,000*l.*, in the manner directed by the instrument creating the fund, and as regarded "my *other property*," at the discretion of the trustees (but not on the personal security of any trader); "and the annual produce and income of such shares" to be applied for the maintenance and education of the daughters during minority, or until marriage, and the surplus to be accumulated; but such accumulations may, at any future time, be resorted to for the maintenance of such my daughter from whose *legacy* it may have arisen. And I direct and appoint that the *capital or principal* of the respective share or shares of such of my said daughters as shall, at the time of my decease, have attained the age of twenty-one years or shall have married, or shall afterwards attain that age or marry, together with any unapplied surplus or accumulations of the annual produce or income thereof, shall

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shall be held by the trustees or trustee thereof upon the trusts following, namely, upon trust (with the consent in writing of my daughter entitled thereto), to convert the *same into money*, and invest the moneys to arise therefrom in or upon any of the securities applicable for the investment of that particular fund, and from time to time, with the like consent, to vary the investment or investments of the same moneys, for any other or others of the description aforesaid; and upon further trust to pay the annual income of the same moneys, or the stocks, funds and securities," to the daughters, respectively, for life. And immediately after her decease, "as to as well the *capital* of the said settled fund as the annual income to accrue due for the same," in trust for such persons as the daughter should by will appoint; and in default, in case her daughter should leave issue her surviving but not otherwise, in trust to pay, transfer and assign the same to the executors of the daughter as part of her *personal estate*. Then followed other limitations and a gift over to her son *Richard James*, and the testatrix proceeded thus:—

"But if my said son *Richard James* shall die without having attained the age of twenty-one years, and both of my said daughters shall also die under that age and without having married, I hereby declare it to be my will, and direct and appoint, that *all the said moneys, property and effects*, of what kind soever, and whatever source derived, shall be distributed amongst *my next of kin* as if I had died intestate and without having married, such persons, if more than one, to take in the proportions prescribed by the statutes for the distribution of the personal effects of intestates."

And she "*devised* all estates as well *real as personal* of which she was seised or possessed as mortgagee or trustee,

trustee, unto and to the use of her brother *James Brown*, his heirs, executors, administrators and assigns respectively, subject to the equities and trusts affecting the same respectively, and to be disposed of, so far as she was beneficially interested, as part of her *personal estate* for the purposes of her will."

The testatrix died in 1858 seised of the copyhold estate, and the question was, whether it passed by her will.

The Plaintiff, the daughter, contended the former, the Defendant, *Richard James Streatfeild*, her copyhold heir, insisted on an intestacy as to the copyhold.

Mr. *R. Palmer* and Mr. *Freeman* for the Plaintiff.

Mr. *Selwyn*, Mr. *E. Smith*, Mr. *Murray* and Mr. *Bonham Carter* for the Defendant.

The MASTER *of the* ROLLS.

The question in case, on which I reserved my judgment, is, whether certain copyhold property belonging to the testatrix passed by her will. The will begins in these words:—"I, *Charlotte Anne Streatfeild*, widow of," &c. "do make and declare this alone to be my last will and testamentary appointment and disposition of the estates, properties and effects over which I have any power of disposition in manner hereinafter mentioned." A more complete description of real as well as personal estate cannot be required. The will then recites the settlement made on her marriage with her late husband, under which 25,000*l.* was settled on herself for life, with a power of appointment in favor of her children.

The

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The will then recites the will of her father, by which a sum of 2,000*l.* was bequeathed to trustees, in trust for her mother for life, then for herself for life, and then as she should by deed or will appoint, it then recited that she had one son and two daughters, and that the son was amply provided for, but that her two daughters were wholly unprovided for, and it proceeds in these words:—"Now I the said *Charlotte Anne Streatfeild*, as to the said sum of 5,000*l.* &c. &c." [*see this passage, ante, p.* 338.]

Nothing can be clearer than that these words, "moneys, property and effects," are sufficient to pass everything, real as well as personal. She then bequeathed 100*l.* to her son, subject thereto she proceeds thus to give each of her two daughters "one equal moiety or half-part of the entire residue of the said moneys, property and effects." This would also manifestly include everything, but the difficulty is that the subsequent directions have all of them solely reference to personal estate. She directs the share of each daughter to be invested as follows:—as to the 25,000*l.* and 2,000*l.*, in the manner directed by the instrument creating the fund; and, as regarded her other property, to be invested at the discretion of the trustees, the income to be applied for the maintenance and education of the daughters until twenty-one or marriage, and upon trust, with the consent of the daughters, to convert the same into money and invest the money, and from time to time to vary the investment, and to pay the income to the daughters for their separate use for life, and after their decease, in trust for such persons as they should by will appoint, and in default of appointment, to form part of the daughters' personal estate, but if she died without appointment and without issue, then to the other daughter in like manner, and if both died without

without issue and without appointment, to her son at twenty-one, and there is an ultimate gift of all the said "moneys, property and effects" to her own next of kin.

Then comes the appointment of executors and a devise to her brother of all her estates, both real as well as personal, of which she is seised or possessed as mortgagee or trustee.

When I first heard and considered this will, I thought that the copyholds would not pass, by reason of its coming within the principle on which I decided *Coard* v. *Holderness* (*a*), in which case all the words used, with the exception of the opening words of the will, were applicable exclusively to personal estate, and all the limitations were likewise applicable to personal estate, and nothing could be discovered in the will pointing in a different direction. But a more minute examination of this will has brought me to a different conclusion in the present case, and that for these reasons:— The opening words are sufficient to convey every species of real estate; next, the opening part of the operative part of the will speaks of the same subject, and of "the residue of such my property," the testatrix directs and appoints "all the said moneys, property and effects of every kind," and what is, I think, conclusive is that, after directing the "annual produce and income" of the share of the daughter (which words are as applicable to the produce derived from real as from personal estate) to be applied for the maintenance and education of the daughters till twenty-one or marriage, she directs the share to be converted into money and invested. The words are these: "Upon the trusts following, viz. upon trust (with the consent in writing of my daughter entitled

(*a*) 20 *Beav.* 147.

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titled thereto) to convert the same into money, and invest the moneys to arise therefrom" in certain securities.

I thought, at first, that this was confined to the 25,000*l.* and 2,000*l.*, but this is not so, these words clearly include all the property of the testatrix.

This therefore reconciles the whole, and explains why the ultimate trusts should be simply for the next of kin, and why the expressions used are solely applicable to personal estate, or to property of that description.

I am of opinion, therefore, that the copyholds passed by this will, and that they are directed to be converted into personalty, and are made subject to the same trusts as those which relate to the appointed funds.

1859.

PRINCE *v.* HINE. (No. 2.)

July 25.

Two trustees (*A.* and *B.*) were ordered to pay a sum of money into Court; this was paid by *A.* alone. They had severed in their defences and obtained but one set of costs. *B.'s* share of the costs was ordered to be paid to *A.* by way of contribution.

BY an order, made on motion upon the 23rd of *March*, 1859, two trustees (*Hine* and *Johnson*) were ordered to pay the sum of 354*l.* into Court (*a*). *Hine* alone paid the whole. On the cause coming on for further consideration,

The MASTER *of the* ROLLS held that the two trustees, who had severed in their defence, were entitled only to one set of costs; but he held, that *Hine* was entitled to the whole of such costs, and that the share which *Johnson* would have been entitled to should be taken by *Hine*, by way of contribution in respect of his share of the 354*l.*

Mr. *Eddis* for the Plaintiff.

Mr. *R. Palmer* for *Hine.*

Mr. *Southgate* for *Johnson.*

(*a*) 26 *Beav.* 634.

1859.

ARMITAGE *v.* WILLIAMS.

July 20.
Aug. 1.

Bequest of shares, the profits to be invested and the interest applied in the education of the children of *A.* and *B.*, in equal shares; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if *A.* and *B.* should die without issue. *A.* and *B.* had no child at the testator's death:—*Held*, that all the children of *A.* and *B.* took, and that the class was not limited to those born when the first attained twenty-one; and secondly, that the children of *A.* and *B.* took *per capita*, and not *per stirpes*.

THE testator *William Williams*, by his will dated the 13th of *May*, 1801, bequeathed as follows:—"I also direct that the shares I have in the *Monmouth*, *Shrewsbury*, *Wyrley* and *Essington* and *Ellesmere* canals, and also in the *Liverpool* waterworks, shall be paid up, and the profits arising from them shall be invested, half in the funds of this country and the other in the funds of the *United States of America*, the interest arising to be applied to the education of the children of the said *Mary Ann Williams* and *Robert Williams* in equal shares, *and on their attaining the age of twenty-one years, the whole to be sold and divided equally among them.* Should the said *Mary Ann Williams* and *Robert Williams* die without issue, I give the above shares on the same conditions unto the children of my friends *George Simpson* of *Saint Paul's Churchyard*, and *Joseph Kirkup* of *Wandsworth*. The remainder and residue of my estate I give and bequeath unto my niece *Mary Ann Williams*, and *Robert Williams* my nephew, to be equally divided between them, share and share alike, my nephew not to have possession until he arrives at the age of twenty-one years.

The testator died on the 7th of *September*, 1802, at which time neither *Mary Ann Williams* nor *Robert Williams* had any children.

Mary Ann Williams, in 1803, married Mr. *Longden*.

A suit was instituted, and by the decree made in 1807 (*a*), it was declared, that the profits arising from the

(*a*) *See Longdon* v. *Simson*, 12 *Ves.* 295.

the canal and waterwork shares were to accumulate only for the term of twenty-one years from the testator's death, or during the lives of *Mary Ann Longden* and her children, in case they should die before the expiration of the said term.

The twenty-one years expired in 1823, and by an order made in 1824, the subsequent dividends were ordered to be paid to the residuary legatees, who were also next of kin.

Mary Ann Longden died in 1858. She had seven children, and in 1829, the first of them attained twenty-one. Four of them died in her lifetime, of whom three never attained twenty-one.

Robert Williams married in 1824, and died in 1845. He had eleven children, three of whom were born before 1829, when the eldest child of *Mary Ann Williams* attained twenty-one. Three of his children had died, two in their infancy. This suit was instituted, on the death of *Mary Ann Williams*, by her three children, to obtain a division of the shares and the distribution of the fund in Court, amounting to 8,012*l.* Consols.

The Plaintiffs claimed a moiety.

Mr. *Jolliffe*, for the Plaintiffs. First, the legacy is divisible between the children of *Robert Williams* and *Mary Ann Williams per stirpes*. The Plaintiffs and the representatives of the deceased children of *Mary Ann Williams* are therefore entitled to a moiety. But secondly, the fund became distributable in 1829, immediately on the first child attaining twenty-one; *Andrews* v. *Partington* (*a*); *Hagger* v. *Payne* (*b*); *Iredell* v. *Iredell*

(*a*) 3 *Bro. C. C.* 401. (*b*) 23 *Beav.* 474.

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Iredell (*a*), at which time *Mary Ann Williams* had seven children, and *Robert Williams* three. The funds are therefore, in that view, divisible into tenths, and the Defendants are entitled to three-tenths only.

Mr. *Selwyn* and Mr. *H. F. Bristowe* insisted that the shares and fund were divisible equally amongst the children of *Mary Ann Longden* and *Robert Williams* *per capita*, for the division was to be made "equally amongst them," namely, the children of both. That they were therefore divisible into eighteenths; *Mainwaring* v. *Beevor* (*b*).

They argued that the children took vested interests at their births, and they relied on the direction to apply the interest to the education of the children.

Mr. *Shebbeare*, for the representatives of a deceased child of *Robert Williams*, cited *Mills* v. *Norris* (*c*).

The MASTER *of the* ROLLS was of opinion, that, according to the true construction of the will, the canal and waterwork shares or the proceeds thereof were divisible amongst all the children of *Mary Ann Williams* (afterwards *Mary Ann Longden*) and *Robert Williams* equally *per capita* and not *per stirpes*. And that, in the events which had happened, the same were now divisible into eighteen equal parts, and payable to each of the children of *Mary Ann Williams* and *Robert Williams*, or the legal personal representatives of such of them as were dead.

(*a*) 25 *Beav.* 485.
(*b*) 8 *Hare*, 44.
(*c*) 5 *Ves.* 335.

1859.

PALMER *v.* HENDRIE.

July 29.

If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, this Court will prevent his suing at law to recover the mortgage money.

A mortgagor having transferred the equity of redemption, the transferees and mortgagee joined in a partial alienation of the property, but the money was received by the transferees alone:—*Held*, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay.

THIS was a motion for an injunction to stay proceedings in an action at law. The material facts on which the Court proceeded were as follows:—

In 1847, *Palmer* mortgaged some leasehold property to *Hendrie* for 800*l.*, and he covenanted, in the usual terms, to pay the mortgage-money.

After part had been paid off, *Palmer* agreed to transfer the equity of redemption to Messrs. *Overton* and *Hughes*, who were solicitors. Accordingly, by an indenture dated in *February*, 1850, *Palmer* assigned the property to them, subject to the mortgage; and *Overton* and *Hughes* covenanted to pay the mortgage and to indemnify the Plaintiff therefrom.

After this, *Hendrie* executed some deeds, by which he and *Overton* and *Hughes* granted underleases of part of the property at peppercorn rents, and by these transactions considerable sums, by way of premium, were received and retained by *Hughes*. *Overton's* interest in the mortgaged property was transferred to *Hughes*, who, in 1858, absconded and was declared bankrupt.

In *January*, 1859, the executors of *Hendrie* commenced an action at law against *Palmer* upon his covenant, to recover 300*l.* alleged to be due on the mortgage. *Palmer* thereupon filed this bill against the executors, submitting, that in equity he had been relieved from all liability upon the covenant for payment

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ment of the mortgage-money contained in the deed of 1847.

Mr. *R. Palmer* and Mr. *T. A. Roberts* now moved for an injunction to stay the proceedings in the action. They argued, first, that in substance the mortgage had been paid off by the monies received for premiums on granting the underleases.

Secondly, that after the transfer, *Palmer* became a mere surety for the transferees, and that the mortgagee, by joining in selling a portion of the property, had discharged the Plaintiff; *Pearl* v. *Deacon* (*a*).

Mr. *Selwyn* and Mr. *Haddan*, *contrà*, argued, that the mortgagee, being no party to the transfer, had in no way released his right to proceed upon the covenant, and that until fully paid he had a perfect right to make all his securities available; *Willes* v. *Levett* (*b*). That *Hughes* had practised a fraud on *Hendrie* in getting him to execute the underleases and obtaining the moneys, and that *Hendrie* had no notice of the transfer to the solicitors. That *Palmer* had always been a mere mortgagor, and that nothing had occurred to alter his liabilities towards the mortgagee, so as to make him a mere surety. That the Plaintiff, having conveyed away his interest in the estate, could not, under any circumstances be entitled to have it reconveyed to him. *Lockhart* v. *Hardy* (*c*) was also referred to.

The MASTER *of the* ROLLS.

I think that this case does not depend upon the state of the accounts between the Defendant and *Overton* and *Hughes*, or upon the doctrine of principal and surety. I am

(*a*) 24 *Beav.* 186. (*b*) 1 *De G. & Sm.* 392. (*c*) 9 *Beav.* 349.

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I am of opinion that there can be no question as to the relative rights and obligations of a mortgagor and mortgagee. A mortgagee may pursue all his remedies at once; he may bring actions of covenant and ejectment, and at the same time proceed to foreclose the mortgage. If he forecloses it, and afterwards sues on the covenant, he thereby opens the foreclosure; but if he sues on the covenant, and does not get fully paid, he may still go on and foreclose the mortgage. But after he has once been paid in full, under the covenant, he cannot touch the estate, and is precluded from all proceedings afterwards.

These then are the relative duties and reciprocal obligations between mortgagor and mortgagee:—The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money; but as soon as the mortgage money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor.

The question is, whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against the mortgagor to recover the amount of the mortgage money. He can, undoubtedly, at law, sue upon the covenant, and, consequently, the executors of *Hendrie* are, at law, entitled to recover from the Plaintiff the unpaid mortgage money; but the mortgagees must perform their reciprocal obligations:—they are bound, on payment, to restore the property to the mortgagor, and if it appear, from the state of the transaction, that, by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law.

 Suppose

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Suppose a mortgagee has conveyed away the property without receiving any consideration for it, can he afterwards sue the covenantor, who, on his part, is unable to redeem the property, there being none left to redeem? What is there in this case to take away the Plaintiff's right to redeem the property or his right to compel the Defendants to restore it on being paid? I see nothing in the case to do it. It is argued that, by the conveyance of the equity of redemption, the Plaintiff is precluded, under any circumstances, from calling for a conveyance of the estate. But it is to be observed, that the transferees became liable to pay the mortgage money, and that they covenanted to indemnify the Plaintiff therefrom. *Hendrie* was no party to the deed, and his executors insist that it was not binding on them, and that they have a right to sue the Plaintiff on the covenant in the mortgage deed. But he has since admitted the transaction, and granted leases of the property at nominal rents, and has either received the purchase money for the leases or has allowed *Overton* and *Hughes* to do so. I think his executors cannot now repudiate the transfer, and avail themselves of it, for the purpose of saying on the one hand, that it relieves them from their obligation to restore the estate, and on the other, that they can still sue for the mortgaged money.

I do not know what the state of this case may be at the hearing, but there is now sufficient evidence to shew that it would not be right to let the action go on. The Plaintiffs must, however, pay the money into Court.

NOTE.—The cause was heard on the 4th of *May*, 1860, when, upon the evidence then adduced, the Plaintiff obtained a decree.

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TODD *v.* BIELBY.

June 29.
July 22, 30.

When the *corpus* of an estate charged by will with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities. If all the annuitants be living at the period of the division, the value must be ascertained as at the death of the testator. If they be all dead, the values must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the former, will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments.

THE testator devised all his real estates to trustees, their heirs and assigns, upon trust to permit his son *Henry Watson*, and the persons to whom the same estates were thereinafter limited, to enter upon and occupy the same estates, for and during the continuance of such estates as were thereinafter limited to him and them; and on condition that *Henry Watson*, and the persons to whom the same estates were thereinafter limited after his decease, should pay unto each the testator's four daughters, *Mary*, *Jane*, *Alice* and *Ann*, during their respective natural lives, the clear yearly sum of 125*l.*; and upon further trust, in case of any default or neglect in payment, that the trustees should distrain upon or take possession of the estates and receive the rents and profits thereof, and if necessary thereout expel *Henry Watson*, and should let the same premises to any person or persons for any term or terms of years, not exceeding the period during which such annuities or any of them should be payable, for the best improved yearly rents which could be reasonably obtained, such rents to be payable half-yearly; and upon further trust, out of the moneys to be raised by any such distress, or by such entry and receipt of the rents and profits, or by such lettings or otherwise as aforesaid, to pay the annuities.

The testator died in 1820. The personal estate proved insufficient to pay the debts, and part of the real estate had been sold in another suit (*Galland* v. *Watson*) for payment of the debts. The remaining real estate was insufficient

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insufficient to pay the annuities, which fell greatly into arrear.

Mary, one of the four annuitants, died in 1852, *Jane* in 1851, but *Alice* and *Ann* were still living.

This bill was filed in *December*, 1855, by the trustee, for the performance of the trusts of the will.

By the decree made on the 20th *February*, 1857, the remaining real estates were ordered to be sold (*a*); this had been done, and the fund now applicable to the payment of the existing annuities, and the arrears, consisted of about 3,392*l.* £3 per Cents. The arrears due were as follows:—

	£
To *Mary*	1,680
„ *Jane*	1,653
„ *Alice*	2,676
„ *Ann*	2,676
	8,685

The present values of the two subsisting annuities were ascertained to be—

	£
Alice	1,295
Ann	1,388

The cause now came on for further consideration.

Mr.

(*a*) The sale was opposed on that occasion; but the *Master of the Rolls* said, "Take an order for sale; for if that be not done, a fraction of the estate must be sold annually to pay the arrears. The parties entitled to the estate, may, however, argue the point, if, on inquiry, they think it advisable." *See Graves* v. *Hicks*, 11 *Sim.* 551; *White* v. *James*, 26 *Beav.* 191.

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Mr. *R. Palmer* and Mr. *W. R. Ellis* for the surviving annuitants The fund, being deficient, must be divided amongst the annuitants in proportion to the value of their interests; *Innes* v. *Mitchell* (*a*); *Wroughton* v. *Colquhoun* (*b*). The actual value of the annuities to *Mary* and *Jane* have been ascertained by the events which have happened; the values of those given to *Alice* and *Ann* consist of the arrears added to the value of the future payments. The fund must be divided in the proportion of the arrears as to those who are dead, and the aggregate of the arrears and of the value of the future payments as to those who are living. The mode of calculation in bankruptcy must be adopted here.

Mr. *Lloyd* and Mr. *Smythe*, for the representatives of the deceased annuitant, admitted that the fund must be divided amongst the annuitants; but they argued, that the division ought to be in proportion to the value of all the annuities as at the testator's death; *Bowker* v. *Bowker* (*c*). They argued, that *Long* v. *Hughes* (*d*) (the proceedings in which case had been examined, and from which it appeared that some of the annuitants were living and some dead) clearly proved that the valuation must be of all the annuities taken as at the death of the testator. That the same uniform principle must be adopted as to all the annuitants, and that it would be unfair to direct one mode of valuation as to the deceased annuitants and another as to the survivors, or to ascertain the value by the event in one case and by the tabular value in another. That there was no analogy between this case and that in bankruptcy, which was governed by statutory enactments and not by the general law, and the policy of the bankrupt acts was to relieve the bankrupt

(*a*) 1 *Phillips*, 710; 2 *Phillips*, 346.
(*b*) 1 *De G. & Sm.* 357.
(*c*) *Seton on Decrees*, *p.* 100, (*2nd ed.*)
(*d*) 1 *De Gex & Sm.* 364.

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bankrupt from future liability, by enabling annuitants to prove for the value of the future payments, and not for the arrears only.

Mr. *Follett* and Mr. *Wickens* for the remainderman.

Mr. *Rendall* for the tenant for life.

Mr. *Fisher* for an incumbrancer.

Mr. *R. Palmer* in reply.

The MASTER *of the* ROLLS.

July 30. This is a question which, so far as I can make out, has not been determined by any reported case, and depends on the practice of the Court, under the peculiar state of circumstances, which exists in the present case. I will state what I consider to be settled: in the case of a testator who gives various annuities by will, I hold it to be the settled rule, that where the fund is deficient, the values of the annuities are ascertained, and the fund is divided in the proportion of such values. That not only appears to be the reasonable course of proceeding, but it seems to have been settled after consideration on various occasions, as in *Wroughton* v. *Colquhoun* (*a*) before Vice-Chancellor *Knight Bruce*.

I also consider it settled, that if it should happen that all the annuitants are dead, you must ascertain the arrears of their annuities, and divide the fund in the proportion of those arrears.

In

(*a*) 1 *De Gex & Smale*, 357.

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In this case, some of the annuitants are dead and some are living when the fund is to be divided. On one side it is contended, that the principles in *Long* v. *Hughes* must be applied; that you must go back to the death of the testator, and ascertain the values of all the annuities at that time, and then divide the fund in the proportions of the values as thus ascertained. On the other hand, it is argued, that as to the annuities to those who are dead, you must take their actual value as ascertained by the event, and divide in that proportion. If that were not so, the representatives of an annuitant who died within a year or two might, from the fact of the fund being deficient, obtain a much larger amount than he would receive if the fund were sufficient to pay everybody. If the probable duration of the life of an annuitant were ten years, and he died at the end of three, he would receive three years' annuities if the fund turned out sufficient; but in case of a small deficiency, he might receive his annuity for nearly ten years. It is impossible that that can be so, and that, because a fund is deficient, an annuitant is to receive more than is due to him. In the present case, I think that the values of the several annuities must be ascertained in the following manner:—the values of those which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient; the values of those which are still subsisting must be ascertained by adding the amount of the arrears actually accrued to the present value of the annuity. And the fund must be apportioned accordingly.

DECREE.

Apportion the fund in the proportions following:—1,680*l.*, 1,653*l.*, 3,971*l.* and 4,064*l.* *Reg. Lib.* 1858, *B. fol.* 2751.

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FURNESS *v.* THE CATERHAM RAILWAY COMPANY.

July 25.

Railway debentures were granted, by which the "undertaking, and all tolls and sums of money arising by virtue of the act, and all estate, right and interest of the company," were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of parliament, the railway was sold, and the purchase-money paid into Court:—*Held*, that the debentures, being prior in date, had priority over the judgments as against the purchase-money.

THE Plaintiff was the holder of nine debentures of the *Caterham Railway Company*, by which the company had, in the usual form (*a*), assigned "the said undertaking, and all the tolls and sums of money arising by virtue of the act, and all estate, right and interest of the company in the same," to hold until repayment of the amount and interest. Subsequently, on the 6th of *February*, 1858, the *London and Brighton Railway Company* had obtained a judgment against the *Caterham Railway Company* for 956*l.* for the hire of railway, engines and carriages.

The Plaintiff filed his bill to make his securities available; but the Court held, at the hearing, that he was neither entitled to a foreclosure or sale (*b*).

The decree directed the following accounts and inquiries:—(1) what was due to the Plaintiff; (2) what he had received in respect of tolls and profits; (3) what incumbrances there were; (4) what was due thereon and their priorities; (5) what was due for unpaid purchase-money; (6) what lands were subject to any lien for the same; (7) what means could be taken for the purpose of making the railway available for paying the Plaintiff and the other incumbrancers the amounts due to them respectively; (8) what arrangements could be made for working the railway. And the Plaintiff was appointed "receiver

(*a*) *See* 8 & 9 *Vict.* c. 16, ss. 38, 41, *and Schedule C.*

(*b*) 25 *Beav.* 614.

"receiver of the said railway, and of the tolls and profits arising therefrom."

In chambers, an arrangement was made, by which it was agreed, that the *Caterham Railway* should be sold to the *South-Eastern Railway Company* for 14,000*l.*, and an act of parliament was obtained authorizing such sale (*a*).

By this act (s. 4), the agreement, of which a copy was set forth in the schedule, was confirmed.

The fifth section was as follows:—"according to the terms and conditions of the scheduled heads of agreement by this act confirmed, the undertaking, railway and property of the company, and all their powers, rights, privileges and authorities with respect to the same, shall be, by this act and the deed of transfer respectively, transferred to and vested in the *South-Eastern Company*," &c.

The thirteenth section was as follows:—"Forthwith after the transfer takes effect, the *South-Eastern Company* shall pay into the Court of Chancery, to the credit of the suit '*Furness* v. *The Caterham Railway Company and Others*,' the sum of 14,000*l.*, to abide the order of the Court, and neither the *South-Eastern Company* so paying that sum, nor, after the payment of that sum, the railway and property transferred to them, as aforesaid, shall be liable to, or charged, or chargeable with the debts, liabilities and engagements of the company (*b*), or any part thereof; and the company (*b*) shall wind up their affairs," &c.

The

(*a*) 22 & 23 *Vict.* c. xxxv.. (*b*) *The Caterham Railway.*

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The Chief Clerk made his certificate finding the priorities, and the cause now came on for further consideration, and for a distribution of the purchase-money, which was insufficient to pay all the charges upon it. The question was, whether the Plaintiff's debentures had priority, on the fund in Court, over the judgment debt of the *London and Brighton Railway Company*.

Mr. *Lloyd*, for the Plaintiff, argued that the amount due on the Plaintiff's debentures must be paid prior to the judgment debt of the *Brighton Railway Company*, for the latter was a charge subsequent in date to the Plaintiff's security.

Mr. *Surrage* for the *Caterham Company*.

Mr. *W. W. Cooper* and Mr. *Wickens* for vendors having liens on the land sold.

Mr. *Humphry* for the *South-Eastern Company*.

Mr. *Selwyn* and Mr. *Hingeston*, for the *Brighton Railway Company*, argued that their judgment was a charge on the 14,000*l.* prior to the Plaintiff's debentures; that the debentures only charged the tolls, and gave the Plaintiff no right to or in the land; *Perkins* v. *The Deptford Pier Company* (*a*); and that it had been determined by the Queen's Bench, in *Doe* d. *Myatt* v. *The St. Helen's Railway Company* (*b*), that the land did not pass under the word "undertaking." So in *Russell* v. *The East Anglian Railway Company* (*c*), it was held, that mortgagees, whose debts were payable out of the tolls and other estate and effects of a railway company, had no lien on the estate or effects of the company.

That

(*a*) 13 *Sim.* 277.
(*b*) 2 *Q. B. Rep.* 364.
(*c*) 3 *Mac. & Gor.* 125.

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That here the 14,000*l.* represented the *corpus* of the estate, on which the Plaintiff had no charge; that it represented the land and the powers of the *Caterham Company*, which that company had no power or authority (except under the authority of the special act of parliament) to transfer to the Plaintiff.

[*The* MASTER *of the* ROLLS. In that respect the debenture and judgment creditor must be in the same situation.]

The railway is turned into money, and some part, at least, must be *corpus*, which never vested in the Plaintiff. They also referred to 8 & 9 *Vict. c.* 16, *ss.* 38, 42.

The MASTER *of the* ROLLS.

I think the debentures, being prior in date, must have priority over the judgment. If I were to hold otherwise, I should really decide that the debentures were worth nothing.

All I understand by the decisions of the Court on the word "undertaking" is, that it is a right to use the land for the purpose of conveying passengers and making profits by the tolls, that the debenture holders cannot take possession of the land and use it so as to put a stop to the undertaking, and that the mortgages of the undertaking do not enable the mortgagees to put an end to it.

If this were a going and profitable railway at the time the debentures were granted, it would be a strange thing to hold that the mortgagees or debenture creditors were to have less rights than the subsequent judgment creditors. If that be not so, what reason can be assigned why those

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those charges which are prior in date should not now have priority of payment? The question is, whether that which has been sold is not that which has been mortgaged to the debenture creditors. It is the undertaking, the railway and all the powers incidental to it which have been sold, and the *South-Eastern Railway* have acquired, by the purchase, the power to do that which could only be given by an act of parliament, viz, the power to carry on the undertaking. How, then, can it be said that the purchase-money does not represent the undertaking? Here the Plaintiff is mortgagee of the undertaking; he must therefore have priority over the judgment creditor.

In re FOWLER'S TRUST.

July 2, 27.

A testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only. He appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object):—*Held*, that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power.

JOHN FOWLER by his will, dated in 1788, devised freeholds and a copyhold estate called *Vilner* to the use of his son *Charles Fowler* for life, with an exclusive power of appointment to his children and grandchildren (as had been decided in *Fowler* v. *Cohn*) (*a*), and in default of appointment, to the use of his children in tail: and he bequeathed 4,000*l.* in trust for his son *Charles* for life, and from and after his decease in trust to pay, assign and transfer the principal sum of 4,000*l.*, or the stocks or securities wherein the same might be invested, unto such one or more of the children of his said son *Charles*, whether born in the testator's lifetime or after his decease, who, being a son or sons, should respectively live to attain his or their age or ages of twenty-one years, when and as they should respectively attain the same, or, being a daughter or daughters, should

(*a*) 21 *Beav.* 360.

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should live to attain her or their respective age or ages of twenty-one years or be married, when and as they should respectively attain the said age or ages or be married, which should first happen, in such parts, shares and proportions, manner and form as his son *Charles* by any deed or writing, or by his last will and testament in writing, should direct, limit, give or appoint the same, and in default of such appointment in trust to pay, transfer and assign the same unto and amongst all and every the children of his son *Charles* (whether born in the testator's lifetime or after his decease) who, being a son or sons, should live to attain his or their respective age or ages of twenty-one years, or being a daughter or daughters, that age or day of marriage, which should first happen, equally to be divided between them, if more than one, share and share alike.

The testator died in 1790. His son *Charles* had seven children who attained twenty-one, two of whom were dead at the date of his will.

Charles Fowler by his will, dated in 1848, appointed eight-tenths of the 4,000*l.* to five of his children, and he appointed the remaining two-tenths to his granddaughter, *Eliza Sarah Lavinia Cohn* (the only child of a deceased son), and he appointed the freehold and copyhold estate amongst his four children and his granddaughter.

Charles Fowler died in 1843, possessed of a few trifling moveables, but of no other property of his own. The eight-tenths of the appointed fund were paid to his five children, but the remaining two-tenths, appointed to his granddaughter, were paid into Court under the Trustee Relief Act. This petition was presented by the granddaughter and her husband, praying a declaration that

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that the two-tenths of the 4,000*l.* had been well appointed to her, and that it might be paid out of Court to her husband.

Mr. *Lloyd* and Mr. *Amyot* for the Petitioner.

The testator *Charles* might have excluded all the children from any share of the freeholds and have appointed it exclusively to the grandchild. The children cannot retain their interests in the freeholds without giving effect to the appointment of the stock in favor of the granddaughter. No one can claim under a will and against it.

Mr. *Follett* and Mr. *Surrage, contrà.* The principle of election, though this condition is not expressed, is, that a donor may annex to a gift of his own property a condition that the donee shall allow the property of the latter to be disposed of by the former. But a donee of a power cannot annex to the property over which he has a mere power any such condition; it would be simply void. True, it is, that a man having property of his own, and a power of appointment over other property, may, by giving his own property to the objects of the power, put them to their election, either to give effect to the whole disposition, or reject the benefits in the property not subject to the power; *Whistler* v. *Webster* (*a*); but that is simply annexing a condition to the gift of his own property. A mere donee of a power cannot annex to an appointment any condition whatever which is not for the benefit of an object of the power. The gift would be good and the condition void, *Watt* v. *Creyke* (*b*); *Carver* v. *Bowles* (*c*), unless the condition be so mixed up with the appointment as to be a fraud on the power, and then the whole is void.

In

(*a*) 2 *Ves. jun.* 366.
(*b*) 3 *Sm. & Giff.* 362.
(*c*) 2 *Russ. & Myl.* 304.

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In election there must be "some free disposable property" given to the person put to his election, which may be laid hold of to compensate the person disappointed, in case the person put to his election insists on taking his own property and rejects the gift given in lieu of it; *Bristow* v. *Wardle* (a); *Sugd. on Powers* (b); *Trollope* v. *Routledge* (c). But here the testator *Charles* gives no property of his own; he is a mere instrument of the testator *John* to declare who shall take under the will of the latter, and he has no authority to annex to the appointment conditions which are not authorized by that will.

The cases referred to, shewing that an appointment on a void condition is good, and the common case of an appointment made in favor of objects of the power and of a stranger, in which the appointees may insist on the validity of the appointment as regards themselves, and yet exclude the stranger, answer the observation, "that no one can take under an instrument without conforming to the whole of it."

Mr. *Shapter* for the trustees.

The MASTER *of the* ROLLS.

July 27.

On the best consideration I can give to this case, I am of opinion that it does not raise any case of election. A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's; in that case the former is bound to elect whether he will give effect to the disposition of his own

(a) 2 *Ves. jun.* 336.
(b) *Vol.* 2, *p.* 162 (*6th ed.*)
(c) 1 *De Gex & Sm.* 662.

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own estate in favor of the latter, and if he will not, then he cannot take any of the benefits intended for him by the will, and which are thereupon made available for compensating the disappointed legatee or devisee. This is not the case here, for there is no property of the testator. If the testator has improperly exercised the power, so that the property will go as in default of appointment, it will be divisible amongst the seven children, five only of whom take benefits under this will, the other two are not named in it.

It is impossible to say that there is a case of election as to the two who take nothing under the will, and it is equally so as to the others. The case of *Bristow* v. *Warde* (*a*) lays down that the doctrine of election "never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That (using the words of Lord *Loughborough*) cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." It is the same as if the two-tenths, which was appointed to one who was not an object, went over, as in default of appointment, to persons who had nothing to do with the freehold estate.

On the best consideration, I think this is not a case of election, and I must therefore declare that two-tenths of the fund have not been properly appointed, and that they go as in default of appointment.

(*a*) 2 *Ves. jun. p.* 350.

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SCOTT *v.* STEWARD.

July 12.

In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts, &c., and subject to the same powers, &c., or as near thereto as the nature and tenure of the property would admit of:—*Held*, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them.

IN 1850, on the marriage of *Isabella Postlethwaite*, a settlement was executed, whereby two sums of money were settled on Mr. and Mrs. *Postlethwaite* and their issue, and the deed contained a covenant that all the real and personal estate which Mrs. *Postlethwaite* should, during the coverture, become seised and possessed of should be settled "upon the same trusts, and for the same intents and purposes, and under and subject to the same powers, provisoes and agreements, as were therein expressed and declared concerning the sums of 600*l.* and 500*l.* thereby settled, or such of the said trusts, intents and purposes, powers, provisoes and agreements as should then be subsisting and capable of being executed, or as near thereto as the nature and tenure of the property and other circumstances would admit of."

A similar settlement was executed on the marriage of Mrs. *Scott* in 1854.

Mrs. *Postlethwaite* and Mrs. *Scott* having, under the will of their aunt, who died in 1855, become seised of the *Moor Row* estate, this suit was instituted by them to have that estate settled pursuant to the covenants in the marriage settlements of 1850 and 1854. The question was, whether the settlements ought to contain powers to grant mining leases.

It appeared that their aunt had, in 1825 and 1846, agreed to grant mining leases of this property for twenty-one years at a fixed rent, first of 50*l.* and then of 100*l.* a year and a royalty.

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Under the first agreement, the lessee sunk a pit in the estate, by means of which he worked the mines and veins of ore to a very limited extent; but being entitled to other mines in the neighbourhood, which he could work upon more advantageous terms, he, after a short time, discontinued the use of the pit, and at the date of the second agreement had not for many years raised any ore from the mines under the estate. The mines and veins of ore remained unworked under the second agreement of 1846, and the testatrix derived no benefit therefrom during her life beyond the fixed rent of 100*l.*

No lease had been executed by the testatrix, but since her decease, the lessee had, for the first time, shewn a disposition to work the mines effectively, and he had, with this view, commenced operations upon the estate and applied for his lease under the agreement. The mines were said to be of considerable value, and the present operations of the tenant involved a large expenditure.

The Plaintiffs submitted, that it was expedient and desirable that, in the settlements, there should be reserved to the trustees power to grant mining or other leases of the *Moor Row* estate, with all powers and privileges, covenants and provisions as were usually contained in leases in the neighbourhood, and full power to let the surface of the land for building.

Mr. *Lloyd* and Mr. *Osborne*, for the Plaintiffs, cited *Hill* v. *Hill* (*a*); *Williams* v. *Carter* (*b*); *Turner* v. *Sargent* (*c*).

Mr. *Selwyn* and Mr. *Hibbert* for the Defendants.

The

(*a*) 6 *Sim.* 136.
(*b*) 2 *Sugd. Pow., App. No.* 23.
(*c*) 17 *Beav.* 515.

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I think I can do what is asked, and in making a reference to approve of proper settlements, I will declare that such settlements are to contain powers to grant mining and agricultural leases of the real estates.

NOTE.—*Reg. Lib.* 1858, *B.*, *fol.* 2513; *see* 19 & 20 *Vict. c.* 120.

MACLEAN *v.* DAWSON. (No. 3.)

July 1.

Administration *ad litem* held sufficient to represent the testator's estates in a suit seeking to establish a specific lien on his shares in a company, which had been possessed by the Defendants (his Scotch executors and residuary legatees), and who had received assets more than sufficient to answer all claims on the testator's estate.

THE case is reported, *ante* (*a*).

The Plaintiffs amended their bill, by stating that the executors of *Joseph Dawson* had refused to prove his will in this country, and that in the present month (*May*) administration of the goods, &c., of *Joseph Dawson*, limited for the purpose only for the Defendant *James Henry Johnson* to become and be made a party to this bill, and to attend, supply, substantiate and confirm the proceedings already had, or that shall or may hereafter be commenced in this suit, or in any other Court between the parties to this bill, or any other parties, touching the matters at issue in this cause, and to obey and carry into execution all orders and decrees of this Court relating to this cause, until a final decree shall be had and made thereon and such decree shall be carried into execution, and the execution thereof fully completed, but no further or otherwise, or in any other manner whatsoever, were granted by her Majesty's Court of Probate to the Defendant *James Henry Johnson*.

The bill by amendment also stated, that the executors knew that the purchase of the shares was void before

(*a*) *Page* 21.

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they distributed the estate. That the personal estate, which came to their hands, was far more than sufficient to answer all the claims on his estate, and that they had admitted assets to answer all purposes.

It prayed, in addition, a declaration that the estate of the testator, and the executors personally, were liable to pay the Plaintiffs the difference in the amounts stated in the second paragraph of the original prayer.

Johnson, the administrator, and the eleven other shareholders in the company, were made Defendants.

Henry Dawson again demurred for want of equity, and on the ground that a legal personal representative of *Joseph Dawson*, duly constituted in this country, was a necessary party to this suit, but that no sufficient legal personal representative of *Joseph Dawson*, constituted as aforesaid, was a party to this suit.

Mr. *Rolt* and Mr. *Cotton* for the Defendant, in support of the demurrer:—*Groves* v. *Lane* (*a*); *Davis* v. *Chanter* (*b*); *Silver* v. *Stein* (*c*).

Mr. *R. Palmer* and Mr. *J. Pearson*, in support of the bill, were not heard. *Ellice* v. *Goodson* (*d*), was referred to.

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July 1. I think, upon the allegation in this bill, the demurrer must be overruled.

When I considered the case before, I treated it as one

(*a*) 16 *Jur.* 1061.
(*b*) 2 *Phill.* 545.
(*c*) 1 *Drew.* 295.
(*d*) 2 *Colly.* 4.

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one of this description:—that if it was to be considered as a debt, then there must be a general administration of the whole estate, and in that respect, there must be a perfect and complete administration, but if it was to be treated as a specific lien upon the particular shares, which upon the allegations in this bill, if they are established, I am of opinion it might be, then you must have all the other persons interested in these shares before the Court. It is then to be considered, in respect of the ulterior relief, what necessity there would be of having the full representation to *Joseph Dawson's* estate. If the Plaintiffs have a specific lien upon the shares, I think there are sufficient allegations upon this bill to shew that *Joseph Dawson* had ten shares, from the time when the purchase was made by him, down to the time when he died: that being so, I do not think it material that there was a variation in those shares, and then all the persons who are interested are brought before the Court; and if it is established that a fraudulent representation was made, I think there would be a specific lien upon those shares in favor of the Plaintiffs, in which case they would be entitled to the first part of the relief.

Then comes the consideration of what would be the right with respect to the collateral account, to be taken for the purpose of knowing whether the interest upon the purchase-money exceeded, or was less than, the profits upon the shares. For the purpose of taking that account, which is collateral to or flowing out of the matters of the original decree, I am of opinion, that a person appointed by the Court, or a legal personal representative *ad litem*, would be sufficient to bind the account, and to do nothing more. If it was then sought to obtain an administration of the estate, for the purpose of obtaining payment out of the assets, undoubtedly

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doubtedly it would be necessary to have a full legal personal representative. But there is an allegation in this bill (the 105th) to this effect:—that the three Defendants, who are the executors in *Scotland*, have possessed and got into their hands assets of the testator far more than sufficient to answer all the claims upon his estate. I agree with Mr. *Rolt*, that the allegation of the admission of assets has only a technical meaning; but it is alleged, that they have actually possession of property of the testator more than sufficient to answer all the claims, which I must take to be the case. Supposing I had a full and complete administration, and this account were taken, there still would be a right to an account against those persons of how much of these assets they had received; but that would not be taken, if it was either proved that they had received more than was sufficient for the purpose of paying all the debts, or if they admitted before the Court, that they had sufficient assets to answer all the debts. If that fact were proved, it would be a mere question of how much they themselves would have to pay, in case the balance was found against them. But if the balance was the other way, and something was found due to the estate of the testator, then I should (as I have done on other occasions) direct the amount due to be paid into Court, to the account of the legal personal representative of the testator, and they could then get it out of Court on taking out administration in this country.

In either mode of viewing it, I think there is sufficient, upon the allegations in this bill, to support the relief which is asked for on the present occasion; and, accordingly, I must overrule the demurrer.

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WILLIAMS *v.* PAGE. (No. 3.)

June 29.

At the hearing, a cause was ordered to stand over for want of parties, and the Plaintiff was to amend his bill by adding the names of such parties or their legal personal representatives. One of them was dead and had no legal personal representative. A motion by the Plaintiff for liberty to proceed in the absence of such representative, or for the appointment of a person to represent his estate, was refused with costs.

AT the hearing of this cause on the 20th of *January*, 1858 (*a*), three absent persons were considered necessary parties to the suit. The cause was ordered to stand over, and the order proceeded as follows:— "And it is ordered, that the Plaintiffs do, on or before the 20th day of *March*, 1858, amend their bill, by adding the names of such parties who executed the subscription agreement and parliamentary contract, or the legal personal representative or representatives of such of them as may be dead, as the Plaintiff may be advised, with apt words to charge them, and bring on the cause again to hearing as they may be advised" (*b*).

One of them, *Patteson*, was dead, and had no legal personal representative.

It was now moved, on behalf of the Plaintiffs, "that the Plaintiff might be at liberty to proceed with this suit in the absence of any person representing the estate of *Henry Patteson*, deceased, or that some person might be appointed by this Court to represent the estate of the said *Henry Patteson* deceased, for the purposes of this suit."

Mr. *R. Palmer* and Mr. *Herbert Smith*, in support of the motion.

Mr. *Selwyn* and Mr. *Freeling*, *contrà*.

Mr.

(*a*) 24 *Beav.* 654. (*b*) *Reg. Lib.* 1857, *B. fol.* 96.

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Mr. *R. Palmer*, in reply.

15 *& 16 Vict. c.* 86, *s.* 44; *Fussell* v. *Elwin* (*a*); *The London Gas Light Company* v. *Spottiswoode* (*b*); *Silver* v. *Stein* (*c*), were cited.

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From the nature of this suit, no person ought to be surprised at every species of objection being taken to the Plaintiffs' proceedings.

The Court, at the hearing, allowed the Plaintiffs to amend their bill, by making a class of persons pointed out in the order parties, or if any of them should be dead, by making their legal personal representatives parties. It so happened that *Patteson*, in his lifetime, was one of this class, and if he had been still living, the Plaintiffs must have made him a Defendant. He, however, was dead, and the Plaintiff might have made his legal personal representatives Defendants. They have done neither; they could not make him party, because he was dead, and they have not made his legal personal representatives Defendants, because there are none, and they have not obtained representation to his estate.

The Plaintiffs now make this motion, either to proceed in the absence of a representative, or that one may be appointed. But according to the terms of the order they are confined to one of two courses, they have an option to adopt whichever they please, and it is not necessary to come to the Court for that purpose. I do not intend to prejudice any objection which may be raised at the hearing, but I think it extremely probable that the state of the suit will not satisfy what I considered necessary at the last hearing. I must refuse the motion, with costs.

(*a*) 7 *Hare*, 29. (*b*) 14 *Beav.* 264. (*c*) 1 *Drew.* 295.

NOTE.—The suit at a subsequent hearing was dismissed, see *post*.

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THOMAS *v.* RAWLING.

July 27.

The costs on the allowance of exceptions for insufficiency may be made payable immediately.

THE Plaintiff in this case took exceptions to the answer of the Defendant *Stubbs*, which, on the 2nd of *June*, were allowed (*a*). An order was drawn up by the registrar, without notice to the Defendant's solicitor, allowing the exceptions with costs, and the taxing master proceeded to tax the costs.

A motion was now made, on behalf of the Defendant *Stubbs*, "that all further proceedings under the order of the 2nd of *June* last might be stayed, or that the order named, drawn up by the Plaintiff, might be set aside, and that the Plaintiff might be ordered to pay the costs of the application."

Mr. *Cottrell*, in support of the motion. The 19th order of 21st *December*, 1833, empowers the Master to certify by whom the costs of exceptions for insufficiency ought to be borne, and in taxing the general costs such costs are to be apportioned. Under the Master's certificate, the costs of exceptions would not, therefore, be payable immediately, but would be included in the general taxation of the costs. By the 13 & 14 *Vict.* c. 35, s. 27, the jurisdiction of the Masters as to exceptions for insufficiency is transferred to this Court, and therefore the same rule applies, and consequently the costs must await the ultimate taxation of the costs in the cause.

Secondly. The general orders subsequently made prove that the same practice was to be continued. The 22nd Order of *November*, 1850, directs, that on an answer being

(*a*) *Ante*, *p.* 140.

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being insufficient, "the Defendant is to pay such costs as the Court shall think fit to award;" but this is confined to the case where a third answer is found insufficient. The same clause is not contained in the preceding order (the 21st).

Thirdly. No notice was given of drawing up the order; it was passed in the absence of the Defendant, and that renders it irregular.

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I am of opinion, that this motion is entirely wrong. It has been argued, that this Court has no power to direct the immediate payment of the costs of exceptions; but I am of opinion, that the general orders are all subject to the general power and jurisdiction which this Court possesses as to costs.

I generally dispose of the costs of exceptions at the time, I always intend them to be paid immediately, and I do not think that I ever made an order that the payment should be postponed until the general taxation of the costs of the suit. It is highly important for keeping the business of the Court regular, that the costs of such proceedings should be finally disposed of at once. I have no doubt that I had jurisdiction, and that I intended them to be paid at once. This motion must be refused with costs.

Mr. *Swanston*, jun., observed, that the reason why no notice had been given of drawing up the order was, because the Registrar's clerk had said that it was a mere matter of course.

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ROSSITER *v.* THE TRAFALGAR LIFE ASSURANCE ASSOCIATION.

May 10.

Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done.

A proposal for a life policy was accepted, on behalf of a *London* assurance company, by their agent in *Australia*, who acted in the transaction through the medium of a sub-agent, and the premium was paid. It was held binding on the company, although the agent had no authority to appoint a sub-agent, and although there were some informalities, but of form only.

THE Defendants, the *Trafalgar Life Assurance Association*, was a *London* assurance company, registered and incorporated under the 7 & 8 *Vict.* c. 110.

By an instrument under their seal, dated in 1853, the association appointed *Marmaduke Constable*, of *Sydney*, its agent in *Australia*, to grant life assurances in the manner mentioned in the resolutions of the board of directors, which the instrument recited. By these, *Constable* was authorized "to grant assurances, on behalf of the company, on first class lives, for any amount, not exceeding, in each case, the sum of 2,000*l.* The acceptance of each life to be signified by a memorandum in writing, signed by *Marmaduke Constable* and by *Charles Nathan*, Esq. (the medical officer of the company in *Australia*) and a duplicate of which memorandum, also signed by such medical officer, is to be remitted, together with the medical and referee's reports, to the chief office in *London*. Every assurance so granted by *Marmaduke Constable*, not exceeding 2,000*l.* in amount, shall be binding on the association.

Secondly, that the memorandum to be given by *Marmaduke Constable*, on granting assurances as aforesaid, shall be in the following terms, that is to say:—

Trafalgar Life Assurance Association.

185—.

A. B. —— of —— having this day effected an assurance for £—— in the *Trafalgar Life Assurance Association*,

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Association, upon —— life for ——, I, *Marmaduke Constable*, hereby, on behalf of the association, acknowledge the receipt of £——, being the amount of the first premium payable in respect thereof, and guarantee that a policy, expressive of particulars, shall be prepared and delivered by the said association to the said ——.

	£	s.	d.	
Premium.				(Agent's signature.) (Medical officer's signature.)

N.B.—On receipt of this memorandum, the assured is effectually assured in the above-mentioned life office for the sum mentioned in the memorandum, if the same does not exceed 2,000*l.*

Thirdly, that the board will, on receipt of such duplicate memorandum and medical and referee's reports, and the particulars of the assurance, prepare and deliver either a policy under the seal of the association, or will forward a written notice that they do not confirm or continue the assurance."

It appeared that Messrs. *Erlam* and *Williams* had acted as a sort of sub-agents for *Constable* in *Sydney*. On the 9th of *August*, 1854, *Frederick Strange*, of *Sydney*, sent in a proposal for an assurance on his life for 1,000*l.* This was written on one of the company's printed forms, and was signed by Messrs. *Erlam* and *Williams* as agents. There were next two references to private friends of Mr. *Strange*, and their replies.

A letter of reference was sent, signed by *Constable* (in print) and by *Erlam* and *Williams*, to Dr. *Nathan*, the medical officer of the company, who examined and passed *Strange* as a first class life, but to be taken at an

an *extra* premium, in consequence of his intended visit to the *Percy Islands*. Dr. *Nathan* forwarded his report, signed by him on the letter of reference, to *Constable*, and *Strange* afterwards paid the first half-yearly premium to *Erlam* and *Williams*, who on the 1st of *September*, 1854, gave him a receipt in the following words :—

"*Sydney, September* 1st, 1854.

"Received of *Frederick Strange*, Esq., the sum of 15*l*. 9*s*. 3*d*. for one half-year's premium on an assurance for 1,000*l*. for life, made by him this day. The policy to be forwarded from *England per* first opportunity.

"*Pro Constable* & Co.,

"£15 : 9*s*. 3*d*. "*Erlam* and *Williams*."

No memorandum in the form mentioned in the power was ever given.

Shortly afterwards, *Strange* went as a naturalist on an expedition to the *Percy Islands*, and on the 14th of *October*, 1854, was murdered there by the native savages.

The company said they received no papers relating to the assurance until the 27th of *August*, 1855, long after the death of *Strange*, and no policy had ever been granted.

The company having refused to pay the 1,000*l*., this suit was instituted by *Rossiter* (to whom *Strange* had assigned the policy) and by the widow and executrix of *Strange*, insisting that the receipt and other documents constituted a valid and complete contract of assurance. The bill prayed, that the company might be decreed to pay the 1,000*l*., with interest.

The papers transmitted to the company in *London* in other cases of assurances effected in *Australia* were produced to the Court, and they all consisted, simply, of the proposal, the answers of the two referees and the receipt in a form similar to the present.

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Mr. *Selwyn* and Mr. *Waley* for the Plaintiffs. A perfect contract has been entered into by the agent duly authorized of the company and which is binding on them. If the agent has failed to comply with any formalities, though it may make him responsible to his employers, still it will not invalidate his acts as to third parties who have acted *bonâ fide* and paid the consideration without notice of any private instructions given by the company to their agent. The receipt of *Erlam* and *Williams* is the receipt of *Constable*; it would not require any special power to authorize the clerk or any duly appointed agent of *Constable* to give the receipts for money paid to him; *Erlam* and *Williams* were not the agents of the company, but sub-agents of *Constable*, and empowered to assist him as a clerk or servant.

Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the company, contended that the assurance was not in conformity with the power given to *Constable*, by an acceptance signified by a memorandum signed by *Constable* and *Nathan*, and the remittance of a duplicate. That the receipt was signed by *Erlam* and *Williams*, and not by *Constable*, who, as the attorney and agent of the company, had no power to delegate his authority. That the company were not bound by any assurance in respect of which their agent had not exercised his judgment and discretion, but had committed them to a stranger. Secondly, that *Constable* had no authority to accept such a risk as an insurance on the life of a person going to the *Percy Islands*, which islands, they said, were situated beyond the limits allowed by the company's policy, and were inhabited by barbarous savages. *Wing* v. *Harvey* (*a*) was cited.

The MASTER *of the* ROLLS.

I think, upon the evidence before me, that the Plaintiffs are

(*a*) 5 *De Gex, M. & G.* 265.

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are entitled to a decree in this case. The question really is, whether there was, when Mr. *Strange* died, a policy binding this company. It is admitted that a power of attorney was granted by the company to Mr. *Marmaduke Constable* to grant policies upon first class lives for sums not exceeding 2,000*l.*, and where that was communicated to the central office in *London*, the company might either confirm or reject it; that the rejection dated from the period when the notice of the rejection was received out in *Sidney;* but, in the meantime, (provided that the policy was within the terms of the power,) it was valid. Then the question arises, whether, upon the facts before me, there has been a valid contract of assurance entered into by an agent of the company.

I must, in the first place, determine whether the contract was entered into by the agent of the company, that is, whether this was a transaction with *Marmaduke Constable*, their agent.

It is undoubtedly quite true, that an agent cannot delegate his authority to another person; but I apprehend it to be equally clear, that an agent is entitled to perform, and must necessarily perform a great number of his acts and functions through the aid of persons to whom he delegates his authority. Thus, for instance, when a merchant receives goods from abroad for sale, and he deputes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly; in that case, it would be impossible for the consignor to say that the sale was void, because the merchant did not personally sell them himself, but employed another person for that purpose, by whom the sale was effected. The merchant would, no doubt, be answerable for all the acts of his foreman, but provided

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vided the acts done were proper and within the scope of his authority, they would be the acts of the merchant himself.

Now, what takes place on this occasion. *Erlam* and *Williams* signed certain documents of reference to friends of the assured respecting his life. These two documents contain the particulars respecting the health of *Strange*, and the words *Constable* & Co. are struck through and "*Erlam* & Co." signed as agents. There are two other documents, the proposal and the reference to the medical officer. The proposal to the company is in the ordinary printed form, always used by *Constable*; there is a certificate at the end signed by *Erlam* and *Williams*, as agents, and there is nothing to shew that this was not communicated to *Constable* & Co. But the material document of all is the reference to the medical officer, which is, in the regular form, used in all these documents, with the printed certificate with the words "*Erlam* & Co." added, and that is regularly answered by the medical officer in the ordinary form, and transmitted to the office. The company omits to state from whom it received this document, but say that they received it in *London* in *August*, 1855, for the first time. The officer of the company must know from whom they received it, and therefore it is to be inferred that they received it regularly from their agents in *Sydney*, because, in a matter of this description, their silence must be taken most strongly against them. That being so, I looked at other documents of similar description, and I found that nothing else is usually sent to the office but those four documents; first, the proposal; secondly, the two references to the friends who speak to the health of the person proposing to effect an insurance; and lastly, the certificate of the medical officer. These are the only four documents,

(and

(and a great many others have been produced to me in exactly the same form); they are merely pinned together.

The power of attorney states, that the memorandum to be given by *Constable* shall be in a particular form, having both the agent's and the medical officer's signature. The company does not state that this form was adopted on every or upon any occasion in which they accepted proposals made through *Constable*, and no evidence is given that upon any one occasion such a memorandum was transmitted to the office. On the contrary, from those which have been produced, and from the evidence of *Haycraft*, it would appear, that the four documents which I have mentioned, that is, the proposal, the two answers to the inquiries, and the certificate of the medical officer, constituted the only documents which the company considered necessary or required. Then I have these documents, and they, in substance, sufficiently comply with the power of attorney; there is the signature of the medical officer, and the printed signature of the agents, which it is not alleged was improperly obtained from them or improperly made use of, and the signature of *Erlam* and *Williams*. I have also the receipt for the first year's premium, and I do not find that, on any occasion, any duplicate receipt was ever signed or transmitted to the office.

Then as to the point of other persons having been associated with *Marmaduke Constable* in obtaining assurances, that appears to me to be regular and within the clear duty and province of the agent of the office in order to obtain insurances.

Another question then arises:—was the money ever paid? because, if the premium was not paid, undoubtedly

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that might make a difference; but here is a receipt proved, signed by *Erlam* and *Williams* for *Constable* & Co., and all the evidence shews, that *Erlam* and *Williams* were acting for *Constable* & Co. The receipt by *Erlam* and *Williams* was one by which *Constable* & Co. would be bound, and was, in fact, as much a payment to *Constable* & Co. as a payment to a foreman in a shop in *London* would be a payment to the master himself. If so, I have the four documents which are required, and I have also the proof of the receipt of the money.

In addition to that, I have a letter of the 6th of *February*, 1856, written by an acknowledged agent of the company, which refers to his letter of the "first instant," which sends a copy account with *Erlam* and *Williams* to *December*, 1854, and states, "that the latter persons were appointed sub-agents by *Constable* & Co., but that, having failed, they have never paid over the premiums received by them." Whether *Erlam* and *Williams* have paid the amount over to *Constable* I cannot tell, but they were bound to do so, and it was a matter of account between them, being money received for his use; but as between the company and *Constable*, it was money received by *Constable* for the company.

The only other question is, whether the peculiar risk was one within the scope of the authority of *Constable* & Co. to entertain, and I find nothing in the power of attorney to limit it. They were restricted to first class lives, and this was one, and was so certified by the medical officer; and although the assured was about to embark in a hazardous expedition, the agents insisted on an additional premium for that risk, which was paid accordingly. I think that this policy was within the scope of the authority, and, upon the evidence, that this

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this was a contract entered into by the company through their agent *Constable*:—that the reference to the medical officer must be treated as made by them, and that there was a ratification of the matter as soon as they received the first premium. The particular form of words, required in the power of attorney, seems never to have been acted upon, and was a matter of mere form, having no substance. The only three things of substance which are thereby required are, the signature of the agent, the signature of the medical officer, and the payment of the money; and, although the signature of the agent was printed, it appears that no other signature was ever given.

I am, therefore, of opinion, that this was a contract entered into by the company, and, there being no fraud in the transaction, that the company are liable to pay the 1,000*l.* with interest from the present time and the costs of the suit.

NOTE.—Affirmed with costs by the *Lords Justices*, on the 9th of *July*, 1859, and the Defendants were, in addition, ordered to pay interest at 4*l. per cent.* from the 1st of *March*, 1856.

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July 9.

A testator bequeathed a debt of 4,000*l.* due from his brother to trustees for his brother for life, and he gave 1,000*l.*, part of the said sum of 4,000*l.*, to *A.*; 2,000*l.*, other part of the said sum of 4,000*l.*, to *B.*; and as to the sum of 1,000*l.*, being the remainder of the said sum of 4,000*l.*, to sink into his general estate. He directed that if his estate should be deficient, the legacies should abate proportionably; and if it should be more than sufficient to satisfy the legatees, the legacies should be increased proportionably. At the testator's death, 2,120*l.* only remained due:—*Held*, that the legacies of 2,000*l.* and 1,000*l.* were specific, and ought to abate; secondly, that *A.* and *B.* were not entitled to have the whole 2,120*l.* applied rateably in satisfaction *pro tanto* of their legacies; but that a rateable proportion of the sum of 2,120*l.* ought to be attributed to the 1,000*l.* directed to sink into the residue; thirdly, that the legacies of 2,000*l.* and 1,000*l.* ought to be increased out of the surplus of the testator's estate, in proportion to the reduced amounts payable in respect of such legacies after the abatement.

THE testator, by his will made in 1843, bequeathed a number of pecuniary legacies, and he afterwards devised the residue of his estate and effects to four trustees, in trust to convert and invest on security. And as to the sum, not exceeding 4,000*l.* as might be due to him from his brother *Wm. M'Murdo Duncan* & Co., he empowered his executors to permit it to remain in their hands for three years from his decease. "And as to the said sum of 4,000*l.* so to be received from his brother & Co., and to be invested as part of the *residue* of my estate as aforesaid," upon trust to pay the interest to his brother for life, or until his bankruptcy or insolvency, and subject thereto, in trust to pay the 4,000*l.* unto *Wm. Rathbone Duncan*, *Phillis Barbara M'Murdo Duncan* and *Frederick Wm. Hughes Duncan* (children of his brother), in the following proportions:—to *Wm. Rathbone Duncan* the sum of 1,000*l.*, to *Phillis Barbara M'Murdo Duncan* the sum of 2,000*l.*, to *Frederick Hughes Duncan* the sum of 1,000*l.*

The testator afterwards bequeathed certain pecuniary legacies of 1,500*l.*, 2,000*l.* and 2,000*l.* respectively, which were referred to by him as "further part of such *residue*." He declared no further trusts of the residue than those in the following sentence:—"And I direct, that

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that if my estate (after payment of my debts, funeral and testamentary expenses) shall not be sufficient to satisfy the full amount of all the legacies hereby given, the said several legacies shall abate proportionately. And, on the other hand, if my estate shall be more than sufficient to satisfy the said legatees, the respective amounts thereof, they shall be increased proportionably, my intention being, that no part of my property shall be left undisposed of by this my will, and that the several legatees shall be interested thereunder in the proportions that the amounts of their legacies respectively bear to the whole nett amount of my estate."

The testator made a codicil to his will, dated in 1849, whereby, after reciting the bequest of the 4,000*l.* due from his brother, he revoked the legacy, and in lieu of such legacy " I do give the sum of 1,000*l.*, part of the said sum of 4,000*l.* in the hands of *Duncan* and *Ewing*, to *Wm. Rathbone Duncan*, and the sum of 2,000*l.* (other part of the said sum of 4,000*l.*) to *Phillis Barbara M'Murdo Duncan*, and as to the sum of 1,000*l.*, being the remainder of the said sum of 4,000*l.*, my will is that it shall sink into and form part of my general estate after the death of my brother."

The testator died in 1854, and the Plaintiff, his executor, realised the estate, and paid his debts and funeral and testamentary expenses, and after payment in full of all the legacies given by the will, there remained a surplus of his general estate.

During the life of the testator, his brother paid off part of the debt of 4,000*l.*, and at the testator's decease the sum of 2,120*l.* only was due to him in respect of that debt.

This

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This was a special case, and the questions which arose under the above circumstances were:—First, whether the legacies of 2,000*l.* and 1,000*l.* by the codicil bequeathed to *Wm. Rathbone Duncan* and *Phillis Barbara M'Murdo Duncan* respectively were liable to abatement, by reason of the debt of 4,000*l* having been reduced, by payments made to the testator during his life, to the sum of 2,120*l.*, or whether the deficiency in those legacies ought to be made good to the legatees out of the general estate of the testator. Secondly, whether, in the event of the Court being of opinion that these legacies of 2,000*l.* and 1,000*l.* were liable to abatement, the legatees were entitled to have the whole of the 2,120*l.* applied in satisfaction of their legacies, rateably, or whether a rateable proportion of the 2,120*l.* should be attributed to the sum of 1,000*l.* by the second codicil directed to sink into the residue. Thirdly, whether the legacies of 2,000*l.* and 1,000*l.* ought to be increased by their rateable proportion of the surplus of the testator's estate; and in that event, whether they ought to be increased in proportion to the sums of 2,000*l.* and 1,000*l.* respectively, or in proportion to the reduced sums after abatement.

Mr. *Woodroffe*, for the Plaintiff.

Mr. *R. Palmer* and Mr. *Trevor*, argued that the bequest of 4,000*l.* by the codicil was specific and not demonstrative; *Davies* v. *Morgan* (*a*); *Nelson* v. *Carter* (*b*); and that it must abate; secondly, that the 1,000*l.* directed to fall into the residue was a distinct portion of the specific fund, and not a residue after paying the two legacies; *Page* v. *Leapingwell* (*c*); and, lastly,

(*a*) 1 *Beav.* 405.
(*b*) 5 *Sim.* 530.
(*c*) 18 *Ves.* 463.

lastly, that the two legacies to *William* and *Phillis* were only to be increased in proportion to their reduced amounts after abatement.

Mr. *Follett* and Mr. *Whitehorne, contrà.* The two legacies are not specific but demonstrative, though made payable, in the first instance, out of a particular fund; *Ford* v. *Fleming* (*a*); *Kirby* v. *Potter* (*b*); *Vickers* v. *Pound* (*c*); *Roper on Legacies* (*d*); *Murray* v. *Samson* (*e*); *Fitzgerald* v. *Field* (*f*); and that particular fund is "to be invested as part of the *residue.*" The leaning of the Court is against specific legacies, and the testator declares that these legacies shall abate or increase according to the state of the assets. They cannot, therefore, be specific.

The whole 2,120*l.* must be applied in paying the two legacies of 1,000*l.* and 2,000*l.* in full, and not in producing a fund to fall into the residue, so as to disappoint the legatees, and defeat the intention of the testator.

The increase out of the residue must be in proportion to the amount really intended to be bequeathed, and not to the amount of the legacies diminished by an accidental and unforseen deficiency.

The MASTER *of the* ROLLS.

I think the distinction between the cases very clear. If a person bequeath a debt which is due to him, that is a specific legacy. It is equally so if he bequeath it to several persons in certain shares and proportions, as in equal

(*a*) 2 *P. Wms.* 469; 1 *Eq. Ca. Abr.* 302, *pl.* 3.
(*b*) 4 *Ves.* 748.
(*c*) 6 *H. of L. Cas.* 885.
(*d*) *Pages* 218—220 (*4th ed.*)
(*e*) 3 *Sim.* 536.
(*f*) 1 *Russ.* 428.

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equal moieties or in equal fourths; or if he say, "I give 1,000*l.* out of it to *A. B.*, and the residue to *C. D.*" In all these cases, the legacies are specific. But if he says, I give a legacy of 40*l.* to *A.*, and I desire it to be paid out of the debt due to me from *B.*, this is not a specific legacy: the testator gives a legacy, and merely points to a fund out of which it is to be paid. The question is, whether the testator has given the thing itself, and if that be so, it cannot be treated otherwise than as a specific bequest. Here it amounts to nothing more than this: "whereas my brother owes me 4,000*l.*, I do not wish it to be called in, but when it is paid, I desire it to be invested, and the interest paid to my brother for life, and after his death to be divided amongst his children in the shares I mention;" this, surely, must be specific. The fact of having given a life interest in a legacy does not prevent it from being specific, nor does the circumstance of its being altered in amount between the will and the death prevent its being specific. If he had said, whereas 4,000*l.* will be found in Consols in my name, I give it to trustees for my brother for life, and after his decease, to three named persons in equal shares, and with power for the trustees to invest it in other securities; though the fund might be varied, the bequest would be specific, it would not abate, if the personal estate proved deficient to pay all the legacies; but it would be adeemed if the testator sold out the Consols during his life.

I am of opinion, that the cases referred to of legacies payable out of a particular debt, and which have been treated as demonstrative legacies, do not affect this case, and that this must be considered a specific legacy.

His Honor then declared, that the legacies of 2,000*l.* and

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and 1,000*l.* were specific, and ought to abate, by reason of the debt of 4,000*l.* having been reduced to the sum of 2,120*l.*

And he declared, that *William Rathbone Duncan* and *Phillis Barbara M'Murdo Duncan* were not entitled to have the whole of the sum of 2,120*l.* applied rateably in satisfaction *pro tanto* of their legacies, but that a rateable proportion of the sum of 2,120*l.* ought to be attributed to the sum of 1,000*l.* directed to sink into the residue.

And he declared, that, having regard to the trusts declared of the residue, the legacies of 2,000*l.* and 1,000*l.* ought to be increased, out of the surplus of the testator's estate, in proportion to the reduced amounts payable in respect of the legacies of 2,000*l.* and 1,000*l.* after such abatement as aforesaid.

DUNCAN *v.* DUNCAN. (No. 2.)

July 8.

A testator bequeathed to his nieces 500*l.* owing to him from *A. B.*, and he directed that if his estate should not be sufficient to pay his legacies in full, they should (exclusive of that to his nieces) abate proportionably, and if it should be more than sufficient, they should be increased proportionably. The testator received the debt, and by a subsequent codicil, "in the place of the said intended legacy," gave his nieces 500*l.*, to be paid out of his general personal estate:—*Held*, that the second legacies were substitutionary, and subject to the same incidents, and that the nieces were not entitled to have them increased proportionably out of the undisposed of estate.

BY his will, made in 1843, the testator gave legacies to his nieces, *Isabella Duncan* and *Lucy Christian*, and he thereby also bequeathed to them any sum belonging to him which might be in the hands of his cousin *Charles M'Murdo*, not exceeding 500*l.*

And he directed, as to any residue, that if his estate should be deficient, the legacies (except that of the debt from *Charles M'Murdo*) should abate proportionably, but if more than sufficient, they should be increased proportionably.

By a codicil made in 1849, reciting the bequest of the debt due from *Charles M'Murdo* and his death, and that the debt had been paid, the testator, "*in the place of the said intended legacy*," gave *Isabella Duncan* and *Christian Duncan* the sum of 500*l.*, to be paid out of his general estate.

The estate was more than sufficient to pay the legacies, and one question was, whether the legacy of 500*l.*, bequeathed to the nieces by the codicil, ought to be increased out of the surplus of the testator's estate, under the provision in his will.

Mr. *R. Palmer* and Mr. *Trevor*, for the Defendants *Isabella Duncan* and *Lucy C. Duncan*. The legacies of 500*l.* are not substitutional, and are not liable to the same incidents as the legacies previously given; *Chatteris*

teris v. *Young* (*a*); *Alexander* v. *Alexander* (*b*). Here the gift is not of the same character, but essentially different; the original gift was specific, but this is a general legacy payable out of the general personal estate.

Mr. *Follett* and Mr. *Whitehorne, contrà*, were not heard.

The MASTER *of the* ROLLS.

This is exactly the same legacy, merely substituting one in the place of the other, and it cannot make any difference that one is a general legacy of 500*l.* and the other a specific bequest. I must declare that the legacy of 500*l.* ought not to be increased out of the surplus of the testator's estate, under the general direction for the increase of his legacies.

(*a*) 2 *Russ.* 183. (*b*) 5 *Beav.* 518.

POYNTZ *v.* FORTUNE.

July 15.

A landlord had, in 1827, agreed to grant his tenant a lease, but none had been granted, though the tenant had been in possession. On a bill by the tenant for specific performance, the landlord set up, by way of defence, that the tenant had committed waste. The Court directed the lease to be executed and antedated, and the question of waste to be tried at law.

IN 1827, the Plaintiff and Defendant signed an agreement, whereby the Defendant agreed to grant the Plaintiff a lease of a farm for three lives, "the said lease to contain *all usual covenants* and agreements as are usual in leases for three lives."

The Plaintiff entered into possession, but no lease had been granted. The Defendant gave the Plaintiff notice to quit, and he afterwards brought an action of ejectment to recover possession of the farm.

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The Plaintiff filed this bill for a specific performance, and for an injunction to restrain the ejectment.

The Defendant insisted that the Plaintiff had mismanaged the farm, and had committed waste thereon, and had committed acts, which would have been breaches of the covenants in the lease of the farm, if any such lease had been granted. The Plaintiff contended the contrary, and that if any such act or breach of covenant had, in fact, been committed, the same had been waived by the Defendant, by the subsequent acceptance of rent and otherwise.

Mr. *Freeling*, for the Plaintiff, cited *Pain* v. *Coombs* (*a*), and see *Rankin* v. *Law* (*b*).

Mr. *R. Palmer, contrà.*

The MASTER *of the* ROLLS.

I think this matter ought to be tried at law; it will occasion some extra expense, but this is exactly the case for a jury. What I think must be done is this:—there must be a reference to settle a lease, in case the parties differ, to contain all such "covenants and agreements as are usual in leases for three lives," and to be dated the 8th of *April*, 1827, the Defendant undertaking "in any action at law, to be brought by either of them against the other, in respect of the matters in the Plaintiff's bill mentioned, to admit the execution by the Defendant of the said lease as upon the said 8th day of *April*, 1827."

Order the Plaintiff to execute a counterpart, continue the injunction and reserve further consideration, with liberty to apply (*c*).

(*a*) 1 *De Gex & Jones*, 34.
(*b*) *L. C.*, 28 *May*, 1860.
(*c*) *Reg. Lib.* 1858, *B. fol.* 2695.

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HESKETH *v.* MAGENNIS.

July 23, 26.

A testator said—"I leave my wife 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz. the sum of 454*l.* 9*s.* 9*d.* for life." He subsequently stated that he had 200*l.* in the savings bank, and 454*l.* 9*s.* 9*d.* and 30*l.* in addition in another bank. His property consisted of the 454*l.* 9*s.* 9*d.* and 30*l.* and some furniture, and there was in the savings bank a sum of 200*l.* in his wife's name, being part of her separate estate:—*Held*, that this latter sum was the 200*l.* referred to in the will.

A testator gave some property to his wife for life and proceeded thus:—"At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz. one-half to the widow and children of my deceased brother *John Bennett*, the widow, if surviving, to have an equal share with the children:—*Held*, that the survivorship had relation to the death of the tenant for life and not of the testator; and, secondly, that the children took in joint tenancy.

THE testator, by his will, dated in 1840, bequeathed as follows:—

"I leave my wife, *Margaret Bennett*, 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz., the sum of 434*l.* 9*s.* 9*d.*, for the remainder of her life. At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz., one-half to the widow and children of my deceased brother, *John Bennett*, the widow, if surviving, to have an equal share with the children; the other half to go to my brother, *William Bennett*, of *Moses' Gate*, near *Bolton*, if surviving at the death of my widow, otherwise to go to the children of the said *William Bennett*. I wish my wife, *Margaret Bennett*, to have the use of all my household furniture during her life, afterwards to be equally divided among those of my brothers' children who may be living at the time of my widow's decease.

"I have deposited in the savings bank 200*l.*, and in the bank of Messrs. *Parr*, *Lyon* and *Greenhall* the before-named sum of 434*l.* 9*s.* 9*d.* In addition to which sum I have in the same bank 30*l.*, which I wish, should this illness terminate in death, to be drawn from the bank for necessary purposes."

The testator died in 1840. His estate, at his decease, consisted

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consisted of the sums of 434*l.* 9*s.* 9*d.* and 30*l.*, mentioned in his will, and of household furniture of the value of 32*l.*; but upon inquiring at the savings bank, it appeared that the testator had no money deposited there, although there was in such bank a sum of 200*l.*, being the separate estate of *Margaret Bennett*, the widow, and which had been deposited in the savings bank in her name, and was then standing to the credit of her account there.

The testator's widow, *Margaret Bennett*, died in 1858, and the widow of the testator's brother, *John Bennett*, predeceased her. After the death of *Margaret Bennett*, questions had arisen, first, as to the legacy of 200*l.* given by the will, &c. The administratrix of *Margaret Bennett* claimed to have that sum paid to her out of the testator's estate, but such claim was disputed by the residuary legatees.

Secondly, whether the widow of *John Bennett*, who survived the testator, but died in the life of the testator's widow, took any share.

Thirdly, the Defendant *Ann Barton* (a daughter of *John Bennett*, the brother, and who represented two deceased brothers) claimed to be entitled to a share of one moiety of the testator's residuary estate, contending that the gift to the widow and children of *John Bennett* was a gift to the parties taking thereunder as tenants in common, but the children of *John Bennett*, who survived *Margaret Bennett*, contended that such gift was a gift to the parties as joint tenants.

Mr. *C. Hall*, for the Plaintiffs, the executors.

Mr. *Cole*, for the representatives of *John Bennett* and

and of *Elizabeth*, argued that the gift to "the widow" of *John*, "if surviving," had reference to her surviving the testator, and not to her surviving the testator's widow. Secondly, that the children took as tenants in common.

Mr. *Follett*, Mr. *Osborne* and Mr. *Westlake*, *contrà*, were stopped.

The MASTER *of the* ROLLS was of opinion, first, that the 200*l.* mentioned in the will was the sum of that amount deposited in the savings bank.

Secondly, that "surviving" meant surviving the testator's widow, the words being, "at the decease of my wife I leave," &c. &c., "if surviving."

Thirdly, that that bequest of the first moiety of the 434*l.* 9*s.* 9*d.* was, after the death of the testator's widow, given to the children of *John Bennett* as joint tenants, there being (he said) no words of severance.

NOTE.—*Reg. Lib.* 1858, *A. fol.* 2682.

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Feb. 15, 17.

The directors of a loan company were empowered to borrow money, but directors who were "concerned in or participated in the profits of any contract with the company" vacated their offices. The chairman lent money to the company at high interest, which was afterwards lent out at a profit:—*Held*, that this was warranted by the rules.

Discounting the bills of a director is a lending of money within a clause prohibiting loans to shareholders.

Decree to compel directors in a joint-stock company to take shares subscribed for by them, and which were transferable, refused.

THE bill was filed by a shareholder of "*The Western Deposit and Advance Company* (*Limited*)," on behalf of himself and all other the shareholders, except the Defendants, under the following circumstances:—

In 1857, the Defendants *Mallalue*, &c. and other persons being desirous of forming a company, signed a memorandum in the form required by "The Joint Stock Companies Act, 1856" (19 & 20 *Vict.* c. 47, ss. 3, 5, 7, and Schedule, Form A).

The objects of the company were stated to be "for receiving or borrowing money, either on deposit, or loan notes, or debentures, or other security or property of the company, and allowing or paying interest thereon," and "for granting loans to any person or persons, whether shareholders in the company or not." They subscribed the memorandum of association in the form required, which concluded thus:—"We, the several persons whose names and addresses are subscribed, are desirous of forming into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

The number of shares set opposite to the names of the Defendants were, *Mallalue*, 20; *Best*, 10; *Davis*, 25; *M'Evily*, 60.

The articles of association were afterwards signed by the same persons. They provided (45), that the business of

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of the company should be managed by the directors. The other articles principally relied on were as follows:—

"47. The office of director shall be vacated if he ceases to hold the qualification mentioned in the preceding article; if he holds any other office or place of profit under the company; if he becomes bankrupt or insolvent; *if he is concerned in or participates in the profits of any contract with the company;* if he participates in the profits of any work done for the company.

"67. The company may receive or borrow money either at call or on deposit, or on the security of loan notes or debentures, or other security or property of the company, or on the directors' own individual responsibility (either joint or several), for such time or times and at such rate or rates of interest as the directors may think proper: provided always, that the amount or amounts so borrowed do not, in any case, exceed the amount of the unpaid portion of the capital of the company.

"68. The company shall employ its funds, as well as the moneys that may have been borrowed, in granting loans at interest, in sums not exceeding 2,000*l.*, to any person or persons, whether shareholders in this company or not, or to any body or bodies corporate, upon any sort of security (real or personal, British or foreign) which the directors shall consider sufficient.

"70. The company may discount bills of exchange and promissory notes for shareholders of the company and other persons.

"71. The directors may also lend to any shareholder of the company an amount equal to 75*l.* per cent. of the amount paid on the shares held by such shareholder, who shall deposit such shares as a security for

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the repayment thereof with interest, as shall be agreed between such shareholder and the directors.

"73. No loan or loans shall be granted by the company to any of the directors, or other officers of the company, beyond the 75*l.* per cent. upon the amount paid upon his shares, and which shares shall form the security for repayment of the amount borrowed, with interest; nevertheless, the directors may receive the suretyship of a director, or other officer of the company, for the repayment of loans granted to other persons, if they should deem it expedient so to do."

The company was duly registered under the statute, a proper certificate of incorporation was given by the registrar of joint-stock companies, and the company became a body corporate, and proceeded to carry on its business.

By this bill, the Plaintiff complained that the Defendants, the directors, had been carrying on the affairs of the company in a manner inconsistent with the articles of association, and had dealt improperly with the funds and affairs of the company. The principal charges of complaint were:—

First. That *Mallalue*, the chairman, was in the habit of drawing bills and promissory notes in his own name, and of mixing up his own dealings with those of the company. That he had been in the habit of lending moneys to the company at a rate of interest between 10*l.* and 15*l.* per cent., which they afterwards employed in discounting bills, &c., and that he had thereby made considerable profits out of the property of the company, contrary to the 47th article.

Secondly. That the directors had, contrary to the 73rd

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73rd clause, lent the moneys of the company to the directors on personal security, beyond the amount of 75*l.* per cent. upon the amount paid upon their shares, and, in particular, had lent 150*l.* to the Defendant *Davis*.

Thirdly. That the Defendants *M'Evily*, *Davis* and *Mallalue* had taken a far less number of shares in the company than those for which they subscribed the memorandum of association. Thus, *M'Evily* has subscribed for sixty shares and had only taken ten and had disposed of the others to other persons.

The bill sought, first, to make *Mallalue* account for the profits received by him for loans, &c. to the company, or, at all events, for the interest received by him on his loans beyond 5*l.* per cent.; secondly, that the directors might be made liable for the loans to the other directors; thirdly, that *Mallalue*, *Davis* and *M'Evily* might be declared liable for the number of shares subscribed for by them. It also prayed an injunction to restrain the acts complained of.

Mr. *R. Palmer* and Mr. *Bevir* for the Plaintiff. *Hudson* v. *The York and North Midland Railway Company* (*a*).

Mr. *Selwyn* and Mr. *Elderton* for the Defendants.

The MASTER *of the* ROLLS.

In this suit, the grounds of complaint are three:— First. That the Defendant *Mallalue*, who is the chairman, draws bills and promissory notes in his own name, and mixes up his own dealings with those of the company. Secondly. That loans have been made by the directors to members of their own body. Thirdly. That the directors

(*a*) 18 *Beav.* 70.

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directors have not fulfilled the contract they entered into on the formation of the company, they having taken a less number of shares than they agreed to take.

I think the Plaintiff has not proved the first, so far as it is essential. It is true that the company is a corporation, and that the corporate name ought to be used in all its transactions; but if, practically, the transactions have been by the corporation, and for the benefit of the corporation, I do not think that the omission to use the name of the corporation is such a matter as calls for the interposition of this Court; it is a mere departure from form. It is certainly established that *Mallalue* has mixed up his own name with these transactions, but it is also proved, that bankers and others will not deal with a limited company, unless some name they consider of sufficient responsibility is on the paper negociated, and *Mallalue* has put his name on the bills negociated for and on the part of the company; but this mixing up the name of the chairman with the company on paper negociated cannot be complained of.

There is then a complaint that on loans made to strangers, *Mallalue* has obtained a portion of the profit with the company, and that this is directly at variance with the rules of the company, and contrary to the principles of equity generally. It is important to observe what are the objects of the company; they are to borrow money to lend it again, and by such means to get any amount of interest at the cheapest rate. The nature of these transactions appears, on the evidence, to be this:—The company had no money except deposits, and on various occasions *Mallalue* has lent money to the company at one rate of interest, and the company has then lent it out again to strangers at an increased

increased rate. *Mallalue* took 10*l.* per cent., but in every case the company obtained a benefit.

The question is, if this transaction is contrary to the rules of the company. By the 67th rule, the company is at liberty to borrow from whomsoever they please on the directors' responsibility. The company may borrow from *A.*, and one of the directors may be responsible; I see little difference between that and the director himself lending. I find nothing in the clause, which limits the power of the directors and officers of the company to prevent directors lending money to the company. The company may borrow on the directors' own individual responsibility from any one.

The clause principally relied on is that numbered 47, by which a director vacates his office, if he is concerned in or participates in the profit of any contract with the company. I think this sort of transaction is not "participating in the profits of a contract with the company." The company have lent money to *A.* at 15*l.* per cent., *Mallalue* is no party to that contract, except as director of the company, and there is a previous contract, by which he has lent money to the company at 10*l.* per cent. That does not appear to be participating in the profits, which it would be, if it had been agreed that the money received from *A.* should be divided between him and the company. I find nothing else in the clause which points to the subject directly, or overrules the general power and authority which the company has in this matter. The limitation is as to the amount to be borrowed, they may borrow it where they can do so cheapest, and they may, possibly, do it best from the directors.

There are various cases, in which I have held, as in *Hudson's*

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Hudson's Case, that directors are trustees, and cannot make a contract, entered into by them for the company, beneficial to themselves. This may be controlled by the rules and objects of the company; and here the directors are expressly authorized to join in borrowing, and therefore it appears, that the contract of foundation takes it out of the general rule.

With respect to the loan to directors, which is contrary to the rules, it appears that the company have lent money to *Davis* a director. They borrowed from *Marylebone Building Society*, and then lent to *Davis*, a director, on his promissory note at three months at 15*l.* per cent. He got 145*l.*, and gave two promissory notes for the amount. The 73rd rule says, that no loan shall be granted by the company to any director beyond 75*l.* per cent. on the amount paid upon his shares. It is obvious, that the Plaintiff is right as to this, unless the distinction, which was pressed upon me by Mr. *Selwyn*, can prevail, viz.: that this rule makes a distinction between a loan and a discount. But I am of opinion, there is no such distinction. If there were, the 73rd rule would be inoperative, because the directors would have nothing more to do than take a bill, and then make a loan to a director.

The third objection as to shares fails. I take the case of *M'Evily*, who subscribed for sixty shares, and only took ten, and has disposed of the others to other persons. I do not think that clause of the Joint Stock Companies Act assists the case, because if the shares were registered in his name in the register book of the company, he might transfer them immediately after. I think the 20th clause does apply, and under it he has full power to get rid of the shares immediately after they are placed in his name.

There

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There is, therefore, no contract to be specifically enforced; it would be only compelling persons to take shares which they might at once get rid of.

On the whole, I think these parties ought to have settled their differences amongst themselves; and the only decree I can make is, to restrain the lending any money to the directors or officers of the company, and, if desirable, to declare that a discount is a loan within the meaning of the articles, and give liberty to apply.

YOUNG *v.* LINDSAY.

July 25, 26.

A shipowner, on the 20th of *March*, 1857, chartered his ship to *A.* for a voyage to *Hong Kong*. The freight was payable "by approved bill on *London* at three months' date, or cash under discount, following the delivery of a certificate to the charterers, signed by the consignees" of the delivery of the cargo. On the 24th of *March*, the shipowner assigned the freight to *C.*, who gave no notice to *A.* until *November* following. It turned out, that on the 23rd of *March*, *A.* had sub-chartered the ship to *B.*, whose agent at *Hong Kong* had paid the freight to the agent there of the shipowner:—*Held*, that *A.* was still liable to *C.* for the freight, and that *C.*'s *laches* in giving notice had not deprived him of his rights.

ON the 20th of *March*, 1857, Mr. *Hicks*, the owner of a ship called "*The Queen of Ava*," chartered her to Messrs. *Lindsay*, to take a cargo of coals to *Hong Kong*. The freight was to be paid as follows:—"One-half by bill at four months from the final sailing of the vessel from her last port in *Great Britain*, or in cash under discount, the freighters have powers to insure the amount and deduct the cost from the first payment of freight, and the remainder, less cost of coals, short delivery (if any), by approved bill on *London*, at three months' date, or cash under discount, following the

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the delivery of a certificate to the charterers, signed by the consignees, of the right and true delivery of the whole cargo agreeably to bill of lading."

On the 24th of *March* following, Mr. *Hicks* assigned the latter half of the freight to the Plaintiffs Messrs. *Young*, as a security for advances; but the Plaintiffs gave no notice to Messrs. *Lindsay* of their security until the 20th of *November*, 1857. The ship sailed in *May*, 1857, and arrived at *Hong Kong* in *November*, and discharged her cargo in *December*. The Plaintiffs, in *March* and *April*, 1858, applied to Messrs. *Lindsay*, for payment of the second moiety of the freight, amounting to 748*l.*; but they ultimately, on the 14th of *April*, 1858, declined to pay it.

It appeared that this had occurred:—On the 23rd of *March*, 1857, (the day before the assignment to the Plaintiffs,) Messrs. *Lindsay*, by a charter-party of that date, chartered the ship to Messrs. *Baring*. The terms of this charter-party, as to the voyage to be performed and cargo to be carried, were similar to those of the charter-party of the 20th of *March*, and the charter-party of the 23rd of *March* provided, that the cargo should be consigned to the charterer's agents, and also provided for payment by Messrs. *Baring* to Messrs. *Lindsay* of freight after the same rate and in the same manner as provided by the charter-party of the 20th of *March*, with reference to the freight thereby made payable.

On the 12th of *December*, 1857, Messrs. *Russell*, of *Hong Kong*, who were the agents of Messrs. *Baring* there, and to whom the cargo had been consigned, paid the second moiety of the freight to Messrs. *Lyall* (the agents of Mr. *Hicks*) at that place. Messrs. *Lindsay* having

having refused to pay the Plaintiffs the second moiety of the freight, the Plaintiffs instituted this suit against Messrs. *Lindsay* and Mr. *Hicks* to compel Messrs. *Lindsay* to pay them such second moiety of the freight, amounting to 748*l.* 2*s.* 6*d.*

Mr. *Selwyn* and Mr. *Cotton* for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Druce* for Messrs. *Lindsay*. *Salte* v. *Field* (*a*).

Mr. *Cox* for Mr. *Hicks*.

The MASTER *of the* ROLLS, without hearing a reply, said:—

This is a clear case. A *London* firm entered into a charter-party with a shipowner to charter a ship to *Hong Kong*. Under that charter-party they became liable to pay the freight to the shipowner, amounting in round numbers to 1,500*l.*; half of it was to be paid at once, and the other half was to be paid on certain terms, which I will refer to presently. The shipowner, having this charter-party in his hand, goes to another firm and says, "Will you advance me money on the security of this charter-party?" which the firm does on the assignment of the latter half of the freight.

I shall reserve, until the close of the observations I have to make, my opinion on the point which was very much pressed upon me, as to the time when notice ought to have been given of the assignment, and the amount of laches and the responsibility incurred by the Plaintiffs by not giving notice of this security in *March* instead of in *November*. For the present, I shall simply assume that the Plaintiffs, who advanced money on the

(*a*) 5 *Term Rep. p.* 214.

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the security of the second moiety of the freight, gave notice to the charterers that they had a charge on it. The freight is paid to the shipowner, without regard to this notice, not by the charterers, for no money of theirs is paid, nor is it paid by an agent of theirs nor by any person with whom they have privity. The person who paid it has no claim against the charterers in respect of any payment made by them, and they have no claim against and no account with him. It has been paid in respect of freight, but by a stranger to them. Messrs. *Lindsay* may be entitled to say, as against the shipowner, "You have received the freight; you must not be paid twice over, and cannot come against us." But by what right, or upon what principle or rule of law can they say to the person who advanced money on the security of their liability to pay freight, and who gave them notice of it, "Your claim must be considered as paid and our liability discharged by the payment to the shipowner by a third person, though he was no agent of ours."

The case so far is simply this: *A.* owes *B.* 1,000*l.*, *B.* assigns one-half of the debt to *C.*, and *C.* gives notice of this assignment to *A.* After this *D.*, a third person, says, I owe *A.* money, and thereupon pays 1,000*l.* to *B.* Can *A.* afterwards insist that *C.* is thereby paid? It is against every principle of law. *A.* has paid nothing at all. He may well say to *B.* "You have been paid by another person in respect of this debt, and you cannot be paid twice over;" but it is impossible for *A.* to say to *C.*, who had obtained a lien on the debt due from him, that this payment to *B.* is a payment to *C.*

Russell & Co. were not the agents of *Lindsay* & Co., there was no relation between them, and they had received

received no authority or directions from them of any description.

Then really the question comes to this—whether the charter-party entered into with Messrs. *Baring* is substituted for charter-party entered into with Messrs. *Lindsay*, because, if it be, no doubt there is an end of the question. As regards *Hicks*, I think the evidence shews it was so; but as regards Messrs. *Lindsay*, the evidence convinces me, that the Plaintiffs knew nothing about it. Indeed there was no one to give them notice of it. *Hicks* was not likely to do so, and Messrs. *Lindsay* could not do so, for they knew nothing of the Plaintiffs' claim, and the Plaintiffs positively deny that they had any notice on the subject. But could Messrs. *Lindsay* get rid of their liabilities under the charter-party to *Hicks*, and to those persons who claimed an interest in it under him, which existed before the transfer of the charter-party (if it were a transfer) to Messrs. *Baring?* Clearly not. How far is this contention to extend? If the mere entering into a sub-charter-party removes all their liabilities, it comes to this:—that if the new charterer is insolvent the first charterer is discharged. Supposing *B.* had sub-chartered the ship to *C.* & Co., and *C.* & Co. to *D.* & Co., must you give notice to every one of the sub-charterers one after another? The result would be, that the assignee of freight would never be safe, for having given notice to the original charterer, the security of the assignee might be afterwards destroyed by the subsequent sub-charterers. It is impossible that such can be the law. After the notice given by the Plaintiffs to pay the freight to them, the liability of the Defendants cannot be discharged except by a *bonâ fide* payment to the persons who gave notice of their charge upon the freight. Mr. *Palmer* contended that it did not matter who paid the

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the freight, that if paid by a mere stranger, still if it was paid and received by the owner in respect of freight, it would discharge the persons originally liable, notwithstanding any charge there might be on the freight, of which they had received notice. They were liable to pay and they have paid nothing, and then the question is, whether there is anything which discharges Messrs. *Lindsay* from their liability to pay the Plaintiff's charge on the freight which was created in *March*, 1857. I am of opinion there is not.

I do not go into the question whether there was a good payment by Messrs. *Baring* or by Messrs. *Russell* to Messrs. *Lyall*, or whether *Lyall* & Co. were properly the agents of *Hicks* to receive it. I do not go into that question at all, and I express no opinion upon it; but I say that it cannot be a payment made by Messrs. *Lindsay* & Co., or one of which they can claim the benefit.

But supposing that *Russell* & Co. had been the agents of the Defendants, then another question would arise, a question certainly of some nicety, but on which I express no opinion, namely, whether the notice given on the 19th of *November* in *London* would be sufficient to invalidate a payment made by their agent in *Canton*, on the 12th of *December* following. It is obvious, if the payment had been made at a place where notice could have been given to the agent not to pay it, that the notice of the 19th of *November* to *Lindsay* & Co. would have invalidated any payment made by them or their agent on the 12th of *December*. Whether it would invalidate a payment made by an agent of theirs in *China*, where it was impossible to give the agent notice in time, I do not think it necessary to inquire, because I am convinced that the person in *China* who paid the money was no agent of Messrs. *Lindsay*, and

and that no privity existed between them; it was a payment made by a stranger, of which they seek to claim the benefit, and which I am of opinion they are not entitled to.

Then comes the next question, whether the notice was given by the Plaintiffs in due time, for hitherto I have been assuming that the notice had been given at once. This is a question of great importance, but I am of opinion, having regard to the terms of the charter-party, that the notice was given in time. The terms of the charter-party have, in my opinion, an important bearing on this question; it is necessary to ascertain from them where the second half of the freight was payable. It was not payable until after "the delivery of a certificate to the charterers, signed by the consignees, of the right and true delivery of the whole cargo agreeably to the bill of lading," and everybody had notice of that fact. The coals could not arrive at *Hong Kong* until *November*, according to the ordinary length of the voyage, and they did arrive in that month. In the same month the Plaintiffs gave notice to the charterers, and the freight was not to be paid until after they received a certificate of the delivery of the coals, and accordingly, in the correspondence between the Plaintiffs and *Lindsay* & Co. such is treated to be the case, and I do not find there is anywhere a dispute or doubt as to their liability to pay the amount of the freight, and it is not till *April* that they dispute their liability to pay it. All they say, on the 11th of *March*, 1858, is, that they have got no advice of the certificate.

I am of opinion that this delay does not constitute such laches as can deprive the Plaintiffs of their right. It would, no doubt, have been better if the Plaintiffs had given notice earlier, but they gave notice to the charterers in

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in *November*, at the time the coals were delivered, not to pay any freight until they were paid, and the document on which they advanced their money shewed, that the second half of the freight was payable "by approved bill on *London* at three months' date, or cash under discount, following the delivery of a certificate to the charterers signed by the consignees of the delivery of the cargo." Therefore the consignees at *Hong Kong* were to forward a certificate to *Lindsay* & Co. (who were the charterers) of the delivery of the cargo, and the second half of the freight was then to be payable. It would naturally appear from that, that the freight was supposed to be payable in *London*, as it was to be paid after the delivery of the certificate to the charterers there. However that may be, I think, upon the terms of the charter-party, there are not such laches on the part of the Plaintiffs as to justify me in saying, that they are to lose the security they had obtained on the freight payable by *Lindsay* & Co. I treat the transaction solely as one between *Lindsay* & Co. and *Hicks* in the first instance, the charterers and the shipowner. The charter-party is assigned to the Plaintiffs to secure them a sum of money, and the Plaintiffs gave notice of it to the charterers, not only before any money is paid by them, for at this moment it has not been paid by them, but before any money is paid at all. And although Messrs. *Lindsay* may have claims against other persons or against *Hicks*, upon which I express no opinion, I am of opinion that they have not got rid of their original liability, and that they cannot shift it from themselves to other persons by a sub-charter entered into by them, of which the Plaintiffs had no knowledge, and by which they cannot be bound.

I am of opinion, that the Plaintiffs are entitled to the amount of the freight, with costs.

To

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To avoid misapprehension on the subject, I wish to state my opinion, that if at *Hong Kong* Messrs. *Russell* had been the agents of Messrs. *Lindsay*, and had, prior to the notice of *November*, 1857, received and paid the money to the agent of *Hicks*, the Defendants would have been entitled to have deducted that as a payment which they had *bonâ fide* made; but, in my opinion, the facts are otherwise.

Messrs. *Lindsay* must be at liberty to use the name of Messrs. *Young* in any action they may be advised to bring against *Hicks*, for the purpose of recovering the amount paid by Messrs. *Lindsay* & Co. to the Plaintiffs; indemnifying the Plaintiffs against costs.

NOTE.—Affirmed by Lord *Campbell*, L. C., 2nd *Dec.* 1859.

RHODES *v.* RHODES.

July 4.

It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense.

THE testator devised and bequeathed his residuary real and personal estate, upon trust to sell, convert and invest, and pay the interest of 5,000*l.*, part of the money, to his wife for life, and afterwards unto his children, as his wife should by will appoint, and if she should make no disposition, then the whole 5,000*l.* equally amongst his children living at the time the same should "become divisible, and the lawful *issue* of such of them as shall be then dead, share and share alike," so as such issue take no greater share of the said money

The word "issue" was used in a will on several occasions as equivalent to "children," and the issue were, in some instances, spoken of in reference to their "parent." *Held*, that "issue" must receive the same construction throughout the will.

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money than his, her or their deceased *parent* or parents would have taken, if living.

He then gave other pecuniary legacies to the children when they attained twenty-one, "but if any of my children shall die under the age of twenty-one, leaving *lawful issue*, then I direct his or her legacy, and accumulated interest thereof, to be paid equally amongst *such children*, when and as they shall attain the age of twenty-one years."

He gave the residue of his trust money to his children equally, but declared the interest of each child's share should be paid to such child for life, "and on the death of any child to pay the share of such child equally amongst the issue of such child, share and share alike, when and as they shall attain the age of twenty-one years, with benefit of survivorship to the others in case any of such issue shall die under twenty-one years of age without issue, and in the meantime to apply the interest thereof in the maintenance of such issue. And in case any of my children shall happen to die under the age of twenty-one years without leaving lawful issue, or leaving such and all of them shall happen to die under the age of twenty-one years and without issue, then I direct that the share of such child so dying of and in the said residue of the said trust moneys shall be held by my said trustees for the equal benefit of the survivors of my said children, upon the like trusts and to the like uses and purposes as their original share of the said residue is before limited. But in case any of my children, having attained the age of twenty-one years, shall die without *leaving lawful issue, or any issue of such issue*, then I direct my said trustees to pay his or her share in the residue money" as such child should by will appoint, and in default to his legal personal representatives

sentatives in a due course of administration. "Provided also, and in case all my children shall depart this life without having attained the age of twenty-one years, and *without leaving lawful issue, or any issue of such issue*, then I direct my said trustees to pay to my said wife, if she shall be then living, the rents and interests of all my said estates and moneys during her natural life, and, after her decease, pay the sum of 15,000*l.*, part of the said moneys, to such person" as she shall by will appoint; "and as to all the residue of the said trust moneys, and also my said real estate, upon trust to convey, release and assign over the same unto such of my brothers and sisters as shall be then living and *the lawful issue* of such of them as shall be then dead, and their respective heirs, share and share alike, so as such issue take no larger share thereof than his, her or their deceased *parent or parents* would have taken if living."

The Plaintiffs, who were grandchildren of the testator, insisted that no issue more remote than children of the testator's children were entitled to any beneficial interest in the trust moneys, by virtue of the trusts in the will contained and declared for the *issue* of the testator's children.

The Defendants *Ann Charlotte Cooper*, *Marian Gertrude Streatfeild* and *Richard James Streatfeild*, being great-grandchildren of the testator, claimed, under the limitations of the will, the share of their mother, *Charlotte Brown* deceased.

The case was not affected by the Wills Act, 1 *Vict.* c. 26.

Mr. *Follett* and Mr. *Prendergast*, for the Plaintiffs,

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cited *Sibley* v. *Perry* (*a*); *Williams* v. *Teale* (*b*); *Jarman on Wills* (*c*).

Mr. *Rasch*, for a trustee.

Mr. *Lloyd*, Mr. *E. Smith*, Mr. *R. Palmer*, Mr. *Bonham Carter*, Mr. *Shapter*, Mr. *Prior*, Mr. *Selwyn* and Mr. *Freeman*, for the Defendants, cited *Ridgeway* v. *Munkittrick* (*d*); *Edwards* v. *Edwards* (*e*); *Pope* v. *Pope* (*f*); *Roddy* v. *Fitzgerald* (*g*); *Winterton* v. *Crawfurd* (*h*); *Head* v. *Randall* (*i*); *Ross* v. *Ross* (*k*); *Carter* v. *Bentall* (*l*); *Hedges* v. *Harpur* (*m*); *Dalzell* v. *Welch* (*n*).

The MASTER *of the* ROLLS.

I am of opinion, that the word "issue" means "children." There are many cases where the word issue is so restricted.

I admit the proposition, that the primary meaning of the word "issue" includes every possible class of issue to the remotest generation, and that the burden of proof lies on those who ask to restrict its ordinary meaning; but I think the Plaintiffs have discharged that obligation on the present occasion.

In the bequest of the 5,000*l.*, it is clear that the word "issue" has reference to "his deceased parent," and that the word is in that gift restricted to children.

In the second paragraph he says, that if any of his children

(*a*) 7 *Ves.* 522.
(*b*) 6 *Hare*, 239.
(*c*) *Vol.* 2, *p.* 83.
(*d*) 1 *Dru. & War.* 84.
(*e*) 12 *Beav.* 97.
(*f*) 14 *Beav.* 591.
(*g*) 6 *H. L. Cas.* 823.
(*h*) 1 *Russ. & M.* 407.
(*i*) 2 *Y. & C.* (*C. C.*) 231.
(*k*) 20 *Beav.* 645.
(*l*) 2 *Beav.* 551.
(*m*) 9 *Beav.* 479.
(*n*) 2 *Sim.* 319.

children shall die under twenty-one leaving lawful issue, then his legacy is to be divided "amongst such children." It is clear that the "lawful issue" means children in this sentence also.

He afterwards, on two occasions, speaks of the death of his children "without leaving lawful issue, or any issue of such issue." There again it is clear that the word "issue" is restricted to children. Again, in the ultimate gift to his brothers and sisters living, and the lawful issue of such of them as should be dead, he says "such issue" are to take the share of "their deceased parent," in which case also, by the reference to the parent, the word "issue" is necessarily restricted to children.

I find, therefore, on five separate occasions, the testator uses the word "issue" as equivalent to children.

It is a canon of construction, that where the testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will, if it do not violate the sense.

In this residuary clause, therefore, the word "issue" must, in the last sentence as in the previous ones, be read as synonymous with "children."

I am of opinion, that he has used it in the same sense throughout his will, possibly because he did not like the constant repetition of the word "children."

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Re WILDER'S TRUSTS.

July 29.

By his will, the testator gave a legacy "equally between my brothers and sisters now living;" and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date, he bequeathed another legacy "between my brothers and sisters in like manner as I have directed by my will." *Held*, that the class mentioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class were to take, and not to the class itself, and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy.

THE testator, by his will dated the 5th of *June*, 1844, bequeathed as follows:—

"I give to my dear wife *Augusta Wilder* the dividends, interest or annual produce of 8,500*l.*, being that part of my personal estate which I inherited from my late father, or of the stocks, funds or securities in or upon which the said sum may be invested at the time of my decease, for and during the term of her natural life; and from and after her decease, I give and bequeath the capital of such property, and all dividends, interest and proceeds thereof, *equally between my brothers and sisters now living*, and I direct that the respective shares of such of them as may happen to die in my lifetime shall not *lapse, but shall go* to their respective executors or administrators." The testator appointed his wife his residuary legatee and sole executrix.

The testator, on the same day, made a codicil to his will, bearing date the 5th of *June*, 1844, and which, so far as is material, was in the following terms:—"I desire that the dividends or interest of the sum of 2,425*l.* left me by my brother *William Wilder*, Esq., of *Versailles*, may be retained by my said wife during her life, and that the capital may, at her death, be divided between *my brothers and sisters, in like manner as I have directed by my will* with respect to the 8,500*l.* therein bequeathed."

The testator died in 1849, and his widow in 1858. The testator had twelve brothers and sisters, eight of whom died before the date of his will.

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Of the brothers and sisters of the testator, there were living at the date of his will four sisters only, namely:— *Harriet Amelia*, the wife of *Charles Dixon*, *Mary Anne*, the wife of the Reverend *Frederick Beadon*, *Lucy*, the wife of the Reverend *John Pannel*, and *Charlotte Beaufoy Blackwood*, widow.

Harriet Amelia Dixon died on the 26th of *April*, 1846, in the lifetime of the testator, intestate, and Admiral *Walcott* was her administrator. *Mary Anne Beadon* survived the testator and died on the 11th of *February*, 1853, without issue, *Frederick Beadon* was her administrator. *Lucy Pannel* and *Charlotte Beaufoy Blackwood* were still living.

It was contended, on the part of *John Pannel* and *Lucy* his wife and *Charlotte Beaufoy Blackwood* and *Frederick Beadon*, as administrator of his deceased wife *Mary Anne*, that, according to the true construction of the codicil, they were entitled to the whole of the said legacy of 2,425*l.*, to the exclusion of the legal personal representative of *Harriet Amelia Dixon*. The Petitioner Admiral *Walcott*, however, insisted, that he was entitled, as administrator of *Harriet Amelia Dixon*, one of the four sisters of the testator living at the date of his will and codicil, to one fourth part of both of the legacies.

Mr. *R. Palmer* and Mr. *Shebbeare*, for the Petitioners, argued, that the bequest by the codicil was given to a different class, who were to take as tenants in common. They cited *Lumley* v. *Robbins* (*a*).

Mr. *Lloyd* and Mr. *C. Russell*, *contrà*, the legacy by the codicil is an additional legacy, and is, therefore, intended for the same class, and is subject to the same limitations

(*a*) 10 *Hare*, 621.

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limitations and restrictions as those in the will. Besides, it is expressly given "in like manner" as the legacy by the will.

Mr. *Baggalay* for the trustees.

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My opinion is, that the expression, "in like manner," applies simply to the mode in which the legacy is to be enjoyed, and that the classes are distinct. The will and codicil were made on the same day; the gift by the will is to "my brothers and sisters now living," with a substitutionary gift to their "executors or administrators," to prevent a lapse: that is, on the death of the testator, the brothers and sisters then living, and the executors or administrators of those who may be then dead, constitute the class to take. There were, at the date of the will, four sisters, one died in the lifetime of the testator; the legal personal representative is substituted for the deceased sister, and accordingly takes her share.

By the codicil of the same date, and which must be read as part of the same instrument, the testator directs, that the income of another fund may be retained by his wife for life, and that the capital may, at her death, be divided "between my brothers and sisters in like manner as I have directed by my will." He has not said, "my said brothers and sisters," nor "my brothers and sisters now living," but simply "my brothers and sisters."

The manner in which he had by his will directed them to take is, "equally between" them, and accordingly, by his codicil, he describes the manner in which they are to take by reference to that direction, otherwise they would take as joint-tenants. The words "in

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"in like manner" do not, I think, mean the class mentioned in the will, but a class mentioned in the codicil, who might have been "nephews and nieces," and who are to take in a particular manner. This class is to be ascertained at death of testator.

I think that the distinction pointed out in the case of *Lunley* v. *Robbins* is just: that there are two things to be regarded; first, the class, and, secondly, the manner in which the members of it are to take. The first fund is divisible into fourths, the second into thirds.

As in *Long* v. *Watkinson* (*a*), the administrator of *Harriet* takes one-fourth of the first fund, as legal personal representative and as trustee for the persons beneficially interested in her estate.

(*a*) 17 *Beav.* 471.

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1858. *Dec.* 15.

A trustee taking counsel's opinion to guide himself in the administration of his trust, and not for the purpose of his defence in a litigation against himself, is bound to produce them to his *cestui que trust*; but the relation of trustee and *cestui que trust* must, for that purpose, be first established.

THE testatrix, *Elizabeth Giffard*, by her will, devised her estate, called *Nerquis Hall*, to the Plaintiff *Lloyd Wynne* for life, with remainders over, and she devised her estate, called *Pont-y-Gwyddel*, to three trustees for fifteen years, upon trust to apply the rents in paying the interest of a mortgage, in the repairs, and in payment of law charges, and to apply the rest in forming a sinking fund for the liquidation of her debts on her other estates.

And she declared, that if any person should, during the fifteen years, establish his title to that estate as heir-at-law

A mere claimant to an estate is not entitled to the production of cases and opinions taken by a trustee.

Documents accompanying a case for the opinion of counsel are privileged.

Whether one Defendant can call on a co-Defendant to produce documents in his possession, *quære?*

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at-law of her late uncle *Edward Williams*, to the entire satisfaction of her trustees, the trustees should deliver up possession to such person at the end of the fifteen years, which she devised to him in strict settlement, and she directed her trustees to convey it to him accordingly.

But in case no person should establish a claim to the same estates to the satisfaction of her trustees during the fifteen years, or if any person, whose claim should be negatived by her trustees and considered not duly established, should file a bill against her trustees, or apply in any way to a Court of Equity or Law to endeavour to compel her trustees to come to a different conclusion, and to give him possession of the same estate, then, on such proceedings being taken, she authorized and empowered her trustees, if they should think fit, to convey such last-mentioned estate to the uses expressed concerning her *Nerquis* estate.

The testatrix died in 1842, and the fifteen years expired in *March*, 1857. During this period, several persons, and amongst them the three Defendants, *Williams*, *Ellis* and *Sparrow*, had severally claimed the estate as heir-at-law of *Edward Williams*, but no one had established his claim to the satisfaction of the trustees. The three Defendants, it was alleged, still insisted on their right to the estate.

This bill was filed in 1858 by *Wynne* and the persons entitled in remainder to the *Nerquis Hall* estate against *Humberston* (the surviving trustees), and against *Williams*, *Ellis* and *Sparrow*, to obtain a declaration, that, notwithstanding the claims of the Defendants, the *Ponty-Gwyddel* estate was united to the *Nerquis Hall* estate, and subject to the same uses.

At

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At the requisition of the Plaintiff, *Humberston*, the trustee, made the usual affidavit as to documents in his possession, in which he objected to produce those specified in the second schedule, on the ground that they were privileged. They consisted of three cases for the opinion of counsel, taken in 1857, as to the claim made by the Defendants and others to the *Pont-y-Gwyddel* estate, with counsel's opinion thereon, and copies of the papers sent with such cases.

The question upon appeal from the chief clerk's certificate was, whether he was bound to produce them for the inspection of the co-Defendant *Williams*.

Mr. *C. Hall*, for the Defendant *Humberston*, argued that he was not bound to produce the cases submitted to counsel for his guidance on the conflicting claims, nor the opinions given upon them.

Mr. *Woodroffe*, for the Defendant *Williams*, argued that the cases and opinions were not privileged, being taken by a mere trustee, in reference to the rights of the several claimants to the estate. *Wood* v. *Wood* (*a*) was cited.

The MASTER *of the* ROLLS.

I think the Defendant *Williams* is not entitled to see these documents. There can be no question that the rule is, that where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust*. They are taken for the purpose of administration

(*a*) 3 *Hare*, 65.

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administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred.

Setting aside the great singularity of the position of the trustee in this case, who appears to have taken advice to govern his decision, nor regarding the circumstance that one Defendant is applying for discovery against his co-Defendant, but considering the application as one made by a Plaintiff claiming the estate against *Humberston* as a trustee, still I am of opinion that he is not entitled to see the cases and opinions until a *primâ facie* case of the relation of trustee and *cestui que trust* is established. This is simply the case of a claimant who has not made out his title. If *Williams* is entitled to a production, then any stranger might come and claim the estate and see all the opinions and cases, and a very serious injury might be caused to the persons really entitled to the property. I am of opinion, that he is not entitled to see the cases and opinions.

Mr. *Woodroffe.* The Defendant *Williams* is entitled to see the documents accompanying the case, for they are not privileged.

The MASTER *of the* ROLLS. I think not; they are a part of the case. A person may make a statement to counsel through documents sent with them, they form a part of the statement made to counsel and you are not entitled to see them; it is a matter of indifference whether the statement to counsel consists of one or two documents.

The whole of this proceeeding is anomalous; one Defendant is calling on another Defendant to produce documents in his possession. I have never known before of such a proceeding.

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Dec. 2, 3, 4.
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Though *A.* may be disentitled, by acquiescence, to an injunction to stop *B.'s* manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that *B.* is entitled to an injunction to prevent *A.'s* recovering damages at law. Equity may leave both parties to their legal rights.

Acquiescence in the erection of noxious works, while they produce little injury, does not warrant the subsequent extension of them to an extent productive of great damage.

Injunction to prevent, on the ground of acquiescence, a party injured by copper-works from enforcing a judgment recovered by him for damages at law refused with costs.

IN 1849, the Plaintiff became the under-lessee of some spelter and zinc works called "*The Red Jacket Works*," in the county of *Glamorgan*, and he thereupon adapted them to the manufacture of copper, which he commenced in that year.

In 1853, the Defendant became the occupier of two farms in the neighbourhood of the works called "*Coed-y-Arl Uchaf*" and "*Coed-y-Arl Ishaf*." The first nearly adjoined the works.

In the reduction of copper-ore noxious vapours are liberated, and these exhalations and the deposit it produces are highly injurious to vegetation and to animals that feed on the pastures within the influence of them. The evidence in the cause shewed, that it was not until 1853 that any material injury was done by the works to the Defendant's farm. Up to that time, the roasting furnaces (which principally produced the injury) were but three, but they were afterwards increased to seven. Neither the Defendant, nor his predecessor *Jacob Williams*, took any legal steps to prevent the nuisance arising from the noxious vapours produced from smelting the copper or to stop them.

The nuisance went on increasing, and in 1856 the Defendant brought an action at law against the Plaintiff for the injury done to his farms. The action was tried in *July*, 1858, and the jury awarded the Defendant damages to the extent of 450*l.*

The Plaintiff thereupon filed this present bill against the

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the Defendant, alleging that he had expended large sums of money on the enlargement and improvement of the works, with the full knowledge, privity and approbation of the Defendant's lessors, who, as the Plaintiff alleged, had acquiesced in and encouraged it. The Plaintiff also alleged, that the Defendant, before he became the occupier of the farms, inspected the works, with a view of estimating the injury likely to be occasioned thereby to the farms, and that before he acquired any interest in the farms, he had full notice of all the Plaintiff's rights in respect of the carrying on the works, and was well aware that the Plaintiff claimed such rights.

The bill alleged that the Defendant had not interfered or complained until shortly before the action.

It prayed, that the Defendant might be restrained from taking out execution in the action, and from all further proceedings therein, and from commencing any other action at law against the Plaintiff, for any injury alleged by the Defendant to be occasioned to his lands or any of them, by the carrying on of the Plaintiff's works. And if the Defendant should in the meantime have taken out execution in the action, that he might be decreed to repay to the Plaintiff all moneys recovered by him under such execution, and that the Plaintiff might be quieted in the use, enjoyment and carrying on of his works.

The evidence did not bear out the allegation of the Plaintiff, and the acquiescence proved rather amounted to passive non-interference than active encouragement. But it appeared that the termors and the tenant who had assigned the lease to the Defendant, and the Defendant himself when he took the farms, were all aware of the existence of the works, and had taken no steps before the

the action at law to prevent the manufacture or the enlargement of the works.

A motion was now made for an injunction.

Mr. *R. Palmer*, Mr. *Pullen* and Mr. *Cadman Jones* in support of the motion. They cited *Bliss* v. *Hall* (*a*); *The East India Company* v. *Vincent* (*b*); *Tulk* v. *Moxhay* (*c*); *Elliotson* v. *Feetham* (*d*); *The Caledonian Railway Company* v. *Sprot* (*e*); *Powell* v. *Thomas* (*f*); *The Duke of Devonshire* v. *Eglin* (*g*); *Rochdale Canal Company* v. *King* (*h*); *The Duke of Beaufort* v. *Patrick* (*i*); *The Somerset Coal Canal Company* v. *Harcourt* (*k*); *Daniels* v. *Davison* (*l*); *Bailey* v. *Richardson* (*m*); *Clavering's Case* (*n*); *Hewlins* v. *Shippam* (*o*); *Barnhard* v. *Greenshields* (*q*); *Short* v. *Taylor* (*r*).

Mr. *Lloyd*, Mr. *Grove* and Mr. *Hobhouse* for the Defendant. They cited *Mitford's Plead.* (*s*); *Young* v. *Guy* (*t*); *Harrison* v. *Nettleship* (*u*); *Chuck* v. *Cremer* (*v*); *Terrell* v. *Higgs* (*w*); *Evans* v. *Bremridge* (*x*); *Williams* v. *The Earl of Jersey* (*y*); *Haines* v. *Taylor* (*z*); *The Earl of Ripon* v. *Hobart* (*aa*); *Jones* v. *The Royal Canal Company* (*bb*); *Rennie* v. *Young* (*cc*); *Dann* v. *Spurrier* (*dd*).

Mr. *R. Palmer* in reply.

The

(*a*) 4 *Bing. N. C.* 183.
(*b*) 2 *Atk.* 83.
(*c*) 11 *Beav.* 571.
(*d*) 2 *Bing. N. C.* 134.
(*e*) 2 *Mac.* 449.
(*f*) 6 *Hare*, 300.
(*g*) 14 *Beav.* 530.
(*h*) 16 *Beav* 630.
(*i*) 17 *Beav.* 60.
(*k*) 24 *Beav.* 571.
(*l*) 16 *Ves.* 249.
(*m*) 9 *Hare*, 734.
(*n*) *Cited* 5 *Ves.* 689, *and* 6 *Hare*, 304 *n.*
(*o*) 5 *Barn. & Cr.* 221.
(*q*) 9 *Moore P. C.* 18.
(*r*) 2 *Eq. Cas. Abr.* 522, *pl.* 3.
(*s*) *Page* 111 (*4th ed.*)
(*t*) 8 *Beav.* 147.
(*u*) 2 *Myl. & K.* 423.
(*v*) 2 *Phill.* 477.
(*w*) 1 *De G. & Jones*, 388.
(*x*) 25 *L. J., Chanc.* 334, 102.
(*y*) *Craig & Ph.* 91.
(*z*) 2 *Phill.* 209.
(*aa*) 3 *Myl. & K.* 169.
(*bb*) 2 *Moll.* 319.
(*cc*) 2 *De G. & Jones*, 136.
(*dd*) 7 *Ves.* 230.

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Jan. 13.

The MASTER *of the* ROLLS.

This is an application for an injunction to restrain the Defendant from taking out execution in an action in which he has obtained judgment against the Plaintiff in equity, and from commencing any future action against him, for the injury alleged to have been done by him to the Defendant.

The injury done to the Defendant in equity by the Plaintiff is occasioned by the exhalation and deposit from the works of the Plaintiff, which affect the land of which the Defendant is tenant, and the ground on which the Plaintiff rests his case is, the acquiescence or encouragement of the Defendant, or of those under whom he claims and by whose acts he is bound. The fact of the damage is not in dispute; this has been carefully examined by the trial at law, where, after a lengthened examination, the jury assessed the damage sustained by the Defendant, in equity, up to that time, at 450*l*. The damage is a constantly recurring injury, which goes on from day to day, and which is daily giving rise to fresh causes of action.

There are two questions to be considered in this case: —first, the extent of the acquiescence alleged and proved, and next the legal consequences of such acquiescence as is proved.

On the fact of acquiescence, this is proved, and indeed is not contested on the side of the Defendant:—that the termor and the Defendant himself when he took the farm were well aware of the existence of the works, and that the tenant who assigned the lease to the Defendant had seen them while they were being erected, and that he did not take any steps to prevent such erection.

These

These facts are very material for some purposes; and, accordingly, if the present case were reversed, and the Defendant *Houghton* were here as Plaintiff, seeking the aid of this Court for an injunction to restrain the Plaintiff *Bankart* from permitting the noxious effluvium and vapour to issue from his furnaces, and to be deposited on the Defendant's land, I should be of opinion that the Defendant, by the facts I have mentioned, had debarred himself from any right to obtain such relief as an injunction, and that he must be left to his remedy at law. But it is a totally different matter, when the party who commits the injury, and against whom no injunction is sought, comes here, and calls upon the Court to interfere, to prevent the Defendant from obtaining that legal remedy to which *primâ facie* he would be entitled.

The way in which it is put for the Plaintiff in equity is this:—it is said that in a district where the effects of copper smoke are widely felt and plainly understood, a tenant, who takes lands adjoining copper-works or such works then in the course of erection and who makes no objection to them, must be held to have acquiesced, not only in the evil produced by the works then in the course of erection, but also in all that which may thereafter be produced by their extension; that the addition to the works is a natural consequence of their existence, and that the tenant cannot afterwards complain of the effects of the smoke, which, flowing from the works then existing or thereafter to be added, he must have foreseen, and of which he did not complain.

I think the case a very simple one; I do not think it necessary to go in detail through the evidence which has been adduced on either side. There is a conflict of

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testimony on the question, whether the acquiescence of *Jacob Williams*, the former tenant, under whose assignment the Defendant holds a portion of the land, was obtained, by reason of his trusting to an assertion made by the Plaintiff's son that they were in possession of a patent process by which the copper smoke would be rendered innocuous. In my opinion, it is unnecessary to consider that question, for, upon the fullest concession to the Plaintiff of the truth of all the facts he alleges, his case wholly fails on the merits, and the facts on which he relies do not justify the legal inference he attempts to draw from them.

The roasting furnaces are said to be those which principally produce the injury. The original number of roasting furnaces was small, I think three only. In 1853 they were increased to seven, and since the trial at law another has been added. The evidence shews, that it was not till 1853 that any damage was sustained from the works, which was then but slight. I think it impossible to be reasonably contended, that, because a man has acquiesced in the erection of certain works which have produced little or no injury, he is not afterwards to have any remedy, if, by the increase of the works, at a subsequent period, he sustains a serious injury. But this is what the Plaintiff must establish:—he must satisfy the Court that it ought to interfere to debar the Defendant from obtaining that compensation at law which he would *primâ facie* be entitled to. I am unable to accede to the argument that the Defendant must be held to have foreseen and to have assented, as a probable consequence, to the great and injurious additions which have been made to the works. The highest that it can be put is, that he assented to what was done and to the consequences that were necessarily to be derived from

from that, but no further. The consequences of going further would be most injurious, and would be unwarranted by any authority that I am aware of. It would follow, that a partial obscuration of ancient lights, if assented to, involved a consent to their total obscuration, and that any easement assented to might be increased at the pleasure of the grantee, provided it could be shewn that the increase was only a probable consequence of the use of the easement, if found beneficial. But I do not assent even to the extent of the first limited statement of the proposition. It may well be, that a person's assent is given under an erroneous opinion and view and in ignorance of the consequences. Is that mistake of fact to bind him from thenceforward and for ever? I think not. The Court holds, in cases of election, that a man is not to be considered bound by an election which he has made in ignorance or mistake of the real facts of the case. Undoubtedly there is this important consideration to be borne in mind in dealing with such cases, viz. whether the Court can replace both parties in exactly the same situation as they were in when the first act was done by one side and acquiesced in by the other? If it can, it may probably be the duty of the Court to do so. But if the Court cannot replace the parties in the same situation in which they were before, its usual course is, to decline all interference. Accordingly, here, as I have already stated, if the Defendant were Plaintiff, and coming for an injunction, I should, upon the facts I have stated, leave him to his legal remedy. But it is an error to suppose that the opposite of that proposition holds good, and that, because the Court could not interfere to assist the tenant of the adjoining lands against the person who erected and owns the works, it will therefore interfere to assist the latter against the tenant.

 I am

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I am satisfied, on the evidence, that the Defendant did not know what the injurious consequences would be to his crops and flocks, and the most favorable way I can put it for the Plaintiff is, to believe that he was equally ignorant. If the Plaintiff knew these consequences and the Defendant did not, then, either intentionally or unintentionally, the Plaintiff was obtaining an undue advantage over the Defendant. But if they were both equally ignorant of these consequences, why is the Defendant to be made to suffer for his ignorance more than the Plaintiff? Why is this consent to the erection of works which were not expected to injure and did not injure the land at that time, to confer on one that right to erect works in addition, which will destroy the whole property, and entail on the other the incapacity to make any objection?

I am of opinion that the Defendant and *Jacob Williams*, under whom he claims, never assented to the erection of any works of the extent which have been subsequently made, and that his assent was to the limited extent in which they existed at that time, and that such assent cannot be enlarged. If the proper remedy be the legal one, the Defendant has deprived himself of all remedies except his legal remedies, but he has not deprived himself of these. Both parties have mutually taken the case out of the jurisdiction of equity; injunctions and prohibitory orders have nothing to do with this case on either side; their rights and their defences are legal, to be estimated in damages, and which, up to the time of the trial, have been ascertained at law, and which for the future will be better ascertained at law than they can be in this Court.

It is necessary, in order to avoid misconception as to the view which I have taken of the case, and the observations

vations I have made on the ignorance of the consequences of his assent being not binding on the assenting party, to distinguish between the case where the consequences of the act assented to are obvious and plain, and another where they are necessarily doubtful. This may be easily illustrated; for instance, if a neighbour permit me to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable for ever after to be overlooked, and that he cannot afterwards so build on his close as to obscure that window. This is the extent of the injury which can be produced, and he cannot say that he did not foresee it. So also, if he allow another a right of way across his meadow, he knows and can accurately estimate the extent of the injury that will result from such permission. But if a copyholder allows the lord of the manor to work the coals under the close of the copyhold, by offset out of the adjoining land, does it therefore follow, that if the lord, in winning the coal, works so near the surface as to destroy the farm buildings of the copyholder, he is to have no remedy at law for the injury so done to him? Could the lord be permitted to allege in this Court, that the copyholder must have known that the coal lay near the surface, and that such a result was probable from its having often occurred in the neighbourhood? Certainly not: but, in truth, all such illustrations present a weaker case than that before the Court, and the strongest illustration of the distinction to be taken in such cases appears to me to be, the case of works erected which at first seem to be and are innocuous, and which afterwards, by addition, become seriously injurious to the proprietors of the neighbouring lands.

This is exactly the case where equity declines to interfere

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interfere upon either side, and leaves the parties to their legal rights and legal liabilities. In my opinion, therefore, the case of the Plaintiff fails, and the motion must be refused, with costs.

1858. *May* 6.

TIMINS *v.* STACKHOUSE.

A testator bequeathed to his daughter a perpetual annuity of 25*l.* a-year. By a codicil, he directed that, instead of the money being paid to her, it should be paid to trustees for her, and he proceeded thus:—"after my daughter *C.*'s death, I give the above money to be divided as follows:—to her sister *Anna M.* 100*l.* a-year, and all the rest to be equally divided between her other brothers and sisters or their children." All her brothers and sisters predeceased *C. Held*, first, that *Anna M.* was entitled to a capital sum sufficient to produce 100*l.* a-year. Secondly, that the grandchildren, who survived their parents, took by substitution; and thirdly, that they took *per stirpes*.

THE testator, by his will dated the 1st of *February*, 1811, bequeathed as follows: "I give to my daughter *Charlotte* 250*l.* a year." He then made similar gifts to all his other children (except the eldest) and proceeded thus: "If my children are, by my marriage settlement, entitled to a share thereof, I desire the amount of such sums to be deducted from the above legacies, and wish the several sums to be transferred to each, out of my stock in the funds and mortgage, as most convenient, and the *principal* of each to be at their disposal."

By a codicil, made eleven days afterwards, he expressed himself as follows: "Instead of that part of the money or that part of my estate or money in the funds which I have bequeathed to my daughter *Charlotte* being paid to her, I give and bequeath the same" to certain trustees for her. "After my daughter *Charlotte's* death I give the above money to be divided as follows: "*to her sister, Anna Maria*, 100*l.* *a year*, and the rest to be equally divided between her other brothers and sisters or their children, unless my daughter *Charlotte* should marry and leave children, in which case the principal to descend to those children."

The

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The testator died in 1819. The testator left five children, viz., *Sumner Smith*, *William Richard Smith*, *Sarah Stackhouse*, *Anna Maria Smith* and *Charlotte Smith*.

In respect of *Charlotte's* legacy, the executors set apart a fund, which now amounted to 7,143*l.* 18*s.* 6*d.* Consols.

Charlotte Smith died in 1856, without having been married and having survived all the other children of the testator.

A special case was filed to determine the questions which had arisen under these circumstances, as to the rights of the parties to this fund.

Mr. *Selwyn* and Mr. *Boyle* for the Plaintiff.

First, the bequest of 100*l.* a year to *Anna Maria Smith* was not for life, but of a capital sum sufficient to produce that amount for ever; *Potter* v. *Baker* (*a*). Secondly, the children of the brothers and sisters of *Anna Maria*, who died in the life of *Charlotte*, are substituted for their parents. Thirdly, those children who died in the life of their parent do not participate in the gift; *Ive* v. *King* (*b*). Fourthly, the grandchildren of the testator took *per stirpes*; *Burrell* v. *Baskerfield* (*c*); *Congreve* v. *Palmer* (*d*).

Mr. *Follett*, Mr. *Morris*, Mr. *C. C. Barber*, Mr. *W. W. Cooper* and Mr. *J. J. Jervis*, for the Defendants, *contrà*.

The

(*a*) 13 *Beav.* 273.
(*b*) 16 *Beav.* 46.
(*c*) 11 *Beav.* 525.
(*d*) 16 *Beav.* 435.

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TIMINS v. STACKHOUSE.

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I think the whole of the will very plain. In the first place, it is clear that the bequest to *Anna Maria* of 100*l.* a year is a bequest of capital; the other parts of the codicil clearly shew that.

The second question is quite as plain, namely, to whom the residue of 7,143*l.* 18*s.* 6*d.*, after deducting the fund necessary to produce 100*l.* a year, is to go. That is bequeathed to "her other brothers and sisters, or their children." On the death of *Charlotte Smith*, without children, it therefore went to the other three children of the testator, if living, and if dead, it went to their children, the class was to be ascertained at the death of *Charlotte Smith*.

Sumner Smith, *William Richard Smith* and *Sarah Stackhouse* having all died before *Charlotte Smith*, the tenant for life, their children alone take, and I think that, after deducting sufficient to produce 100*l.* a year, the residue of the Consols is divisible into equal third shares amongst such of the respective children as survived their parents, *per stirpes* and not *per capita*.

DECREE.

"Declare that the bequest of 100*l.* a year to *Anna Maria Smith* was a bequest of 3,333*l.* 6*s.* 8*d.* Consols, the capital fund required to produce an annuity of that amount.

"Declare that *Sumner Smith*, *William Richard Smith* and *Sarah Stackhouse* having all died before *Charlotte Smith*, the tenant for life, 3,810*l.* 11*s.* 10*d.* Consols [being the balance of 7,143*l.* 18*s.* 6*d.*, after deducting the 3,333*l.* 6*s.* 8*d.*] became divisible in equal third shares amongst such of their respective children as survived their parents, *per stirpes* and not *per capita*, and the joint tenancy having been severed, that the parties are now entitled as follows, &c., &c." *Reg. Lib.* 1857, *B.*, *fol.* 1126.

1858.

JENKINS *v.* GREEN. (No. 1.)

July 15, 16.

An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, "except 37 acres thereof," which were not specified. *Held*, that the contract was not void for uncertainty, that the right of selecting belonged to the lessor, he having the first act to do; but that if a lease had actually been granted in the uncertain form of the contract, the right of selecting would then have belonged to the tenant. *Held*, also, that this right of selection must not be exercised oppressively, so as to interfere with the beneficial enjoyment of the rest of the farm.

THE Plaintiff was the rector of *Fillingham*, and in right of his rectory, he was seised of a farm called "*the Glebe Farm*," computed to contain about 437 acres. He agreed to demise it (except thirty-seven acres, which were not specified) to the Defendant.

The agreement was reduced into writing, and was signed by both parties. It bore date the 24th of *April*, 1855, and thereby the Plaintiff agreed that he would, with the consent of the bishop and patron, on or before the 1st of *July* next, grant the Defendant "a good and effectual demise or lease" of the farm, "containing 437 acres, or thereabouts, situate at *Fillingham* and known as the *Glebe Farm*, and now in the occupation of Mr. *William Glover*, *except thirty-seven acres thereof*, to hold the same, with their appurtenances, unto the Defendant *Benjamin Green*, from the 6th day of *April* last, for the term of 14 years." The yearly rent of 600*l.* was to be "*payable half-yearly*, the first half-yearly payment to be made on the 11th of *October* next, with a proportionate deduction for the interval between the 6th day of *April* instant and the 13th of *May* next, the latter day being the time at which the said tenant will enter." The Plaintiff also agreed "to obtain the consent of the bishop of the diocese and of the patrons of the living to the lease."

No arrangement was ever made between the parties as to which of the thirty-seven acres of the farm were to be excepted from the demise. The Defendant entered into possession of the farm on the 13th of *May*, 1855.

The

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JENKINS v. GREEN. (No. 1.)

The bishop and patrons having assented, a lease was prepared, but differences arose between the parties, and ultimately, in *May*, 1857, the Plaintiff filed this bill for the specific performance of the agreement.

The objection now raised was, that an agreement to let "437 acres or thereabouts," "except thirty-seven acres thereof," the land excepted not being specified, was void for uncertainty, and that the Court could not direct it to be carried into execution. The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Beaumont* for the Plaintiff argued that the agreement was valid, that it was capable of being reduced to a certainty by the selection of the thirty-seven acres reserved, *Sheppard's Touch.* (*a*), and that in such cases "always he which is the first agent and which ought to doe the first act shall have the election;" *Co. Lit.* (*b*); *Termes de la Ley* (*c*). That in this case, the lessor had the first act to do, and therefore the right to elect which of the thirty-seven acres should be excepted in the lease belonged to the Plaintiff (*d*).

Mr. *Selwyn* and Mr. *Nalder*, for the Defendant, insisted that the agreement was void for uncertainty, *Bullock* v. *Burdett* (*e*), as the very thing agreed to be demised was left in doubt; that the Court would not decree the specific performance of a contract imperfect and uncertain in its terms, as for instance, one to sell at a price to be fixed by arbitration; *Wilks* v. *Davis* (*f*); and that if there were uncertainty as to the terms of an agreement,

(*a*) *Page* 78.
(*b*) *Page* 145 *a.*
(*c*) *Page* 164, *tit.* "*Election.*"
(*d*) *See* 9 *Viner's Ab.*, "*Election*" (C.); 14 *Viner's Ab.*, "*Grants*" (R.); 3 *Bacon's Ab.*, "*Election*" (*A.*) *and* (*B.*); 4 *Bacon's Ab.*, "*Grants*" (H.); *Noy, Maxims, ch. xxxiii.* "*Grants.*"
(*e*) *Dyer*, 281 *a.*
(*f*) 3 *Mer.* 507.

ment, it could not be carried into execution, even though reduced to writing; *Lindsay* v. *Lynch* (*a*). That the proposal that the Plaintiff should take any part of the farm he chose, to the extent of thirty-seven acres, was a total variation of the contract entered into, and, besides, the Plaintiff might select such a portion of the farm as to render it impossible to cultivate the rest with advantage.

Mr. *Palmer* in reply.

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I must consider this as an agreement to grant a lease of this farm, excepting thirty-seven acres, "on or before the 1st of *July* next," and to obtain certain consents. The selection must therefore be made by the person granting the lease, before it is executed and excepted out of the demise.

But if the lease had been executed in the very terms of the agreement, without specifying the lands excepted, then the right of selecting the excepted lands would rest with the tenant.

The Plaintiff must make his selection before the execution of the lease, but he must not exercise his right oppressively, or in a manner which will make it impossible or difficult for the Defendant usefully and advantageously to occupy the rest of the farm.

There must be a decree for specific performance, with a declaration that the right of selecting the thirty-seven acres

(*a*) 2 *Sch. & Lef. p.* 7.

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acres belongs to the Plaintiff, but that such selection is to be exercised by him before the execution of the lease, and in such manner as not to interfere with any of the clauses in the agreement or with the beneficial enjoyment by the Defendant of the lands included in the lease.

Reg. Lib. 1857, *A.*, *fol.* 1775.

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Feb. 12, 23.

JENKINS *v.* GREEN. (No. 2.)

An incumbent agreed to grant a farming lease of the glebe, at a rent payable half-yearly. The Enabling Statute (5 & 6 *Vict.* c. 27) requires the rent to be reserved quarterly. *Held*, first, that the Court would not compel the lessee to take a lease reserving the rent quarterly. Secondly, that the Court would not, in the face of the act, approve of a lease reserving the rent half-yearly; but thirdly, that if a lease reserving the rent half-yearly had actually been executed by the bishop and patron, it would, in favor of the tenant, have been a perfectly valid lease under the fourth section.

AN incumbent agreed to grant a lease of his glebe for the term of fourteen years, at an annual rent of 60*l.*, "*payable half-yearly*" (*a*). A decree was made for the specific performance of the contract, and the lease was to be settled in chambers.

In settling the lease, reference was made to the last statute enabling incumbents to grant leases of their glebes. By this Act (5 & 6 *Vict.* c. 27) it is enacted, that it shall be lawful for incumbents, with the consent of the patron and bishop, to lease any part of the glebe lands for any term of years not exceeding fourteen years, "*so that* there be reserved on every such lease, payable to the incumbent for the time being of such benefice, *quarterly*, in every year during the continuance of the term thereby granted, the best and most improved yearly rent that can be reasonably gotten for the same," &c. &c.

The contract being for a lease, at a rent "payable half-yearly," the chief clerk found it impossible to settle a lease so as to be consistent with the contract, and at the same time conformable to the requirements of the statute.

(*a*) *See ante*, *p.* 537.

statute. Another difficulty also arose from the decree having been enrolled.

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The cause was brought into Court upon an adjourned summons.

Mr. *Selwyn* and Mr. *Nalder* for the Defendant. The Plaintiff has no power to grant the lease which the Defendant has contracted for. He has undertaken to grant a lease reserving rent quarterly, and this he is unable to do; the statute is imperative, and any lease by the incumbent not in conformity with the requirements of the statute will be void as against his successor. The Court will not sanction an unlawful act to be done by the Plaintiff, such as making the rent payable half-yearly, and, on the other hand, it cannot force on the tenant terms at variance with his express contract, and reserve the rent quarterly, for the purpose of making the lease conformable with the Enabling Statute. The bill ought therefore to be dismissed.

Mr. *R. Palmer* and Mr. *Beaumont*, *contrà*, argued, that the mode of reservation of the rent was not of that essential character as to prevent its being modified so as to make the lease consistent with the formalities required by the Enabling Statute. That the Defendant, contracting for an ecclesiastical lease, must be assumed to have known that it could only be granted in the terms of the statute, that both the parties must be considered as having dealt on the footing of that act; *Kerr* v. *Pawson* (*a*); and that therefore the rent might, without infringing on the substantial terms of the contract, be reserved quarterly.

Secondly.

(*a*) 25 *Beav.* 394.

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Secondly. That the objection was removed by the 4th section of the act, which enacts, "that the execution by the bishop and patron, whose consents are thereby made requisite, of any lease to be granted under the authority of that act, *shall be conclusive evidence* that the lease does not comprise any lands which ought not to be leased under the provisions of that act, and that a proper portion of the glebe lands remains unleased, and that the rent reserved by such lease is the best and most improved rent that could be reasonably gotten for the lands and hereditaments comprised therein at the time of granting such lease, and *that all the covenants in such lease are proper covenants.*"

Consequently, that if the bishop and patron, having had the act called to their attention, now thought proper to execute a lease reserving the rent half-yearly, the Defendant would get a perfect indefeasible title under the 4th section.

Mr. *Selwyn* in reply. The case is like that of a contract involving a breach of trust, which this Court will never permit trustees to carry into execution; here the Court will not sanction the bishop and ordinary in departing from the terms of the statute and in acting contrary to their public duty. But even then, the 4th section does not remove the difficulty; the execution of the lease may be evidence that the covenants are proper covenants, but that only refers to the specific covenants specified in the first section of the act, and not to reservation of the rent, which the act expressly directs shall be reserved quarterly.

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The question now raised was not alluded to at the hearing, but I now think, that the difficulty arising from the statute of 5 & 6 *Vict.* c. 27, is insuperable.

At the hearing, I made a decree for specific performance, with a reference to chambers to settle the lease; the draft of a lease was carried in, and this objection being then taken the matter was brought before me on an adjourned summons. It was argued, that this objection to the lease would be an objection to the decree for specific performance, but although the decree has been enrolled and the cause cannot be reheard, still it appears to me, that it is impossible to get over the objection. The agreement for a lease between the incumbent and the Defendant is express, that the rent shall be reserved half-yearly, and the Act of Parliament imposes certain conditions upon incumbents in granting leases, it empowers them to grant leases for fourteen years, "so that there be reserved or payable quarterly" the "best and most improved yearly rent."

The question resolves itself into this:—whether the Act of Parliament is imperative in saying, that the rent shall be reserved quarterly, and if it is, then, whether I can force on the Defendant a lease reserving the rent quarterly. Secondly, whether, notwithstanding the act, I can approve of a lease in which the rent is reserved half-yearly.

I am of opinion that the act is imperative, and that it is impossible to get over the words of it; it is a permissive clause enabling incumbents to grant farming leases, but with this express condition:—that the best rent shall be reserved

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reserved quarterly. The agreement, on the other hand, is precise, that it shall be paid half-yearly. It is true that in *Kerr* v. *Pawson* (*a*), I held, that when there is an Act of Parliament which relates to the subject-matter of the contract between two persons, it must be assumed that they had the act present to their minds, and that as to all matters left in doubt by the contract, the act must be considered as incorporated in and as forming a portion of it. I should act here on that principle in all matters which are not provided for in the written agreement. But when the contract is precise and at variance with the Act of Parliament, it is impossible to come to the conclusion that the parties had the act in their minds, and that they intended it to control the express terms of their contract.

I think the mode of reservation of the rent is an essential part of the contract, and not a mere formal matter; for it may be of great importance to a person whether he receives his rent half-yearly or quarterly. Therefore, I cannot say that the rent may be reserved quarterly.

The only other question is, whether, under this act, I am at liberty to approve of a lease which reserves it half-yearly. As far as the Defendant is concerned, if he had not raised the objection, and the lease had been granted *sub silentio* with the sanction of the patron and ordinary, I am of opinion the Defendant would have had a perfectly good and valid lease. The fourth clause was introduced to meet this difficulty, and I am of opinion that a perfectly good title would have been given to the Defendant. But the difficulty is this: it is for me to approve of the lease as well as the bishop and

(*a*) 25 *Beav.* 394.

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and Ordinary, and can I, with propriety (having come to the conclusion that the legislature has made this condition imperative,—that the rent shall be reserved quarterly,—and that I have no power to enforce it on the Defendant) approve of a lease which reserves the rent half-yearly, and assume that the Ordinary would consent to it. I am not entitled to throw the burden on the Bishop and say, if you consent I will consent also, or to say, if you approve of it I will force the lease on the Defendant. I think also, that I cannot disregard this clause in the act, and say, that a lease which reserves rent in a manner different from that authorized by the act is a proper lease.

All I can do on the present summons is, to say that I cannot approve of a lease, and, to prevent further expense, it would be well for the parties to consider whether it would not be better to consider the cause before me for further consideration. I may then dismiss the bill, upon a good title not being shewn, notwithstanding that on the first hearing a decree was made for specific performance.

NOTE.—For the subsequent proceedings in this case, see *post*.

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June 24, 25, 27, 30.
July 1.

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Under the 7 & 8 *Vict.* c. 32, the right of a country bank to issue notes belongs beneficially, on the death of a partner, to the surviving partner.

The good-will in a partnership business does not, on the death of one partner, survive beneficially to the others; when it has any value, a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business and at the same place.

After the decease of one of two partners in a bank, the survivor sold the business for 10,000*l.* *Held*, that the estate of the deceased was entitled to a share of so much of the 10,000*l.* as was attributable to the good-will, and special inquiries were directed to ascertain the value, having regard to the fact, first, that the partnership premises belonged to the survivor, secondly, that he had still the right to carry on the same business in the same locality, and thirdly, that the sole right of issuing notes, under the 7 & 8 *Vict.* c. 32, belonged to him.

One of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding on the others, though dissenting.

CHARLES WILLIAM EVERETT and *William Smith* carried on business in partnership as bankers at *Salisbury*. The bank, called the "*New Sarum Bank*," was established in 1811 by Mr. *Everett* and others, and Mr. *Smith*, who had formerly been a clerk in the bank, was admitted as a partner about 1835. The partnership between Mr. *Everett* and Mr. *Smith* was carried on under the style of "*Everett* and *Smith*." The bank was one of issue and deposit, and, under the Bank Regulation Act (7 & 8 *Vict.* c. 32), it was entitled to issue notes to the extent of 15,695*l.* On these notes were printed the arms of the city of *Sarum* and the name of the firm, and of "*The New Sarum Bank*." The partners had executed no articles of partnership, and were entitled to the profits in equal moieties. The house in which the business was carried on was Mr. *Everett's* own freehold property, and had been rented, from year to year, by the partnership firm.

William Smith died on the 8th of *July*, 1856, having appointed his widow (the Plaintiff), and Mr. *Everett*, and two gentlemen named *E.* and *J. Nicholson*, his executors. Mr. *Everett* renounced and disclaimed on the 11th of *June*, 1857, and the others proved the will.

After

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After the testator's death, the business was carried on by Mr. *Everett* alone on the same premises, and under the style of *Everett* and *Smith*, until the 7th of *February*, 1857. In *December*, 1856, Messrs. *Pinckney* entered into negotiations with Mr. *Everett* alone, for the purchase of the banking business; they were willing to give 10,000*l.* for it, but being advised that any new firm would lose the privilege of issuing notes, under the Bank Regulation Act of 1844 (7 & 8 *Vict.* c. 32), unless Mr. *Everett* remained in the firm, they required him to enter into a temporary partnership with them. Ultimately, on the 27th of *January*, 1857, an agreement was signed, by which, in consideration of 10,000*l.* paid to Mr. *Everett*, he agreed to enter into partnership with Messrs. *Pinckney* for one year, and Mr. *Everett* agreed to grant to Messrs. *Pinckney* a lease of the bank premises for seven years, with the option of becoming the purchasers during that period. Messrs. *Pinckney* were to take and bear all profits and losses, and to indemnify Mr. *Everett*, who, on his part, bound himself, during the first six months, to take an active part in the management of the bank.

They carried on the business under the old name of the "*New Sarum Bank*," but changing the style or firm to "*Everett* and *Pinckney*," they continued to issue their notes in a similar form to the old ones, with the variation as to the firm.

Subsequently to this, Mr. *Everett*, on the 3rd of *March*, 1857, sent to the solicitors of *E.* and *J. Nicholson* (the executors) a copy balance sheet, which was examined with the books by their accountant and found correct. *E.* and *J. Nicholson* adopted the account on the 5th of *November*, 1857, they settled it and received the balance of the testator's capital with interest, which

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interest (as the Court held) was paid in lieu of the profits from the testator's death. This was held to be a final settlement, but in the account no credit was given to the estate of Mr. *Smith* for any share in the amount obtained by the sale of the business. Mr. *Everett* had also, at the same time, sent a copy of the balance sheet to the Plaintiff, the executrix. Her solicitor, however, insisted that the testator's estate was entitled to a moiety of the value of the good-will, and in *November* required to be furnished with the particulars of the arrangement with Messrs. *Pinckney*, but it was never procured until after the institution of this suit. She in no way concurred in the settlement of accounts made by her co-executors, and even dissented to the account furnished.

Mrs. *Smith*, on the 12th *December*, 1857, filed this bill against Mr. *Everett* and her co-executors, praying a declaration, "that the estate of Mr. *Smith* was entitled, on his death, to one moiety of the good-will of the banking business of '*Everett* and *Smith*,' and of the profits arising therefrom since his death, and that Mr. *Everett* might pay to the executors of Mr. *Smith* one moiety of the 10,000*l.* with interest."

The benefit of survivorship to the right to issue country bank notes being one of the questions discussed, it may be convenient to refer to the act regulating the matter.

The 7 & 8 *Vict.* c. 32, prohibits (s. 10) any new bank issuing bank notes, or any existing bank (ss. 11 and 13) to issue more than their then average amount. But it is provided (s. 11) that "the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may thereafter take place in the personal composition of such company or partnership, either by the transfer

transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member thereof."

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Batten* for the Plaintiff.

The settlement of accounts between Mr. *Everett* and the executors, Messrs. *E.* and *J. Nicholson*, is not binding on the Plaintiff. In it no credit was given for the share of the good-will, and at the time it was settled, the Plaintiff was pressing for an account of the particulars of the sale of Messrs. *Pinckney*, which she was never able to obtain until after the institution of this suit. There is, therefore, no bar to her now obtaining relief in respect of testator's share of the produce of the good-will.

The beneficial interest in the good-will of a partnership trade forms part of the common assets, and it does not, on the death of one partner, survive, except by express agreement; *Wedderburn* v. *Wedderburn* (*a*); *Crawshay* v. *Collins* (*b*); *Coke, Litt.* (*c*); *Cook* v. *Collingridge* (*d*). It should have been sold with the right to issue bank notes under the 7 & 8 *Vict.* c. 32, ss. 10, 11, 12, which clearly formed a partnership right or asset. No doubt there are difficulties in selling the good-will of a business so as to make it available, consistently with the right of the surviving partner to carry on the same trade; *Cook* v. *Collingridge; Collyer on Partnership* (*e*); but every difficulty on that head is removed when a sale has actually taken place and the value realised, as in this

(*a*) 22 *Beav.* 104.
(*b*) 15 *Ves. p.* 227.
(*c*) 182 *a*, *s.* 282.
(*d*) *Jacob*, 607.
(*e*) *Page* 174.

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this case. The testator's estate is entitled to some portion at least of the 10,000*l.* paid for the business, *Smale* v. *Graves* (*a*), which must be ascertained by an inquiry. They also referred to *Clements* v. *Hall* (*b*) and to *Willett* v. *Blanford* (*c*); *Brown* v. *De Tastet* (*d*).

Mr. *Selwyn* and Mr. *Surrage*, for the Defendant *Everett*, argued that the settlement of accounts between Mr. *Everett* and the two executors was final and binding on the Plaintiff and the estate of the testator, for that each executor had complete power over the whole property; *Herbert* v. *Pigot* (*e*); and see *Williams on Executors* (*f*).

They insisted that the good-will survived to Mr. *Everett*, for he was one of the original founders of the bank, and *Smith* had paid no consideration for it, when he had been taken into partnership;—that the executors of *Smith* had no right to a share in the good-will, which had never been purchased by or ceded to him; *Morris* v. *Moss* (*g*); *Austen* v. *Boys* (*h*). That the good-will of the business of a country banker was inseparable from the right to issue notes and the place of business, both of which belonged exclusively to the Defendant, the first being a personal right conferred by the statute, and not being capable of assignment to a purchaser, and the second his freehold. Good-will "is not a commodity on which a specific value can be placed, or for which a definite allowance can be made. Therefore, upon the death of one partner it is not stock of which the executor of a deceased partner can compel a division, unless

(*a*) 3 *De Gex & Sm.* 706.
(*b*) 24 *Beav.* 333; 2 *De G. & Jones*, 173.
(*c*) 1 *Hare*, 253.
(*d*) *Jacob*, 284.
(*e*) 2 *Crompton & M.* 384.
(*f*) *Part* 3, *ch.* 2.
(*g*) 25 *L. J., Chanc.* 194.
(*h*) 24 *Beav.* 598.

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unless he can also compel a sale of the whole premises and stock, as in the case of a partnership at will. Under these latter circumstances, however, the good-will would accompany the rest of the stock, and might create some additional speculative value in the mind of a purchaser;" *Collyer on Partnership* (*a*).

That if the good-will had been sold alone, it would have been unaccompanied by any right to the banking premises or by any partnership stock or effects, or the right to issue notes, or to prevent Mr. *Everett* afterwards engaging in the same business at the same house in *Salisbury; per* Lord *Eldon* in *Cook* v. *Collingridge*, stated in *Collyer on Partnership* (*b*); and that it would therefore be of no value whatever (*c*).

[*The* MASTER *of the* ROLLS directed the Registrar's book to be sent for, in order that the decree in *Cook* v. *Collingridge* (*d*) might be examined.]

Lastly. That the 10,000*l.* was paid, not for the good-will, but as a consideration for taking Mr. *Pinckney* into partnership.

Mr. *Townsend* for the co-executor.

Mr. *Batten* in reply.

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There are some points in this case which are tolerably clear, but there is one with respect to which I must examine the evidence more carefully before I pronounce any judgment.

In

(*a*) *Pages* 81, 172.
(*b*) *Page* 173.
(*c*) *See Davies* v. *Hodgson*, 25 *Beav. p.* 182, *and Robertson* v. *Quiddington*, *M. R.*, 17 *July*, 1860.
(*d*) *See it stated, post, page* 456.

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In the first place, I entertain no doubt that if two persons carry on business, and one of them dies, a share in the good-will (where it is of any value at all) forms part of the estate of the deceased partner, and his share of it is in proportion to his interest in the concern. But this must be limited by the rights of the surviving partner, and the consequences which necessarily follow from the death of one of the partners.

In this case, if, upon the death of Mr. *Smith*, the whole business had been sold, the purchaser would have had no right to issue bank notes; at least that is my opinion on the construction of the act of parliament; and this circumstance would have considerably diminished the amount of the profits of the banking business, and the amount of the purchase-money. I am also of opinion, that after a sale no one would have had any right to prevent Mr. *Everett* from carrying on the very same business on the very same premises as before. He might not have been entitled to the use of the words "*New Sarum Bank;*" but provided there was then no bank in *Salisbury* called the "*Old Sarum Bank,*" he might have changed the word "*new*" into "*old,*" and carried on his business under that name and exactly in the same place. It is therefore easy to see, that the price which could have been obtained by a sale of the good-will, that is, for the right to carry on the business under the name of the "*New Sarum Bank,*" with the chance of retaining the customers of the former bank, was exceedingly small, not to say infinitesimal.

But that would not conclude the question; because if, in point of fact, the business has been sold, a portion of the purchase-money may be attributable to that particular right, which did not exclusively survive to Mr. *Everett*, and one-half of this would belong to the estate of

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of the testator. It follows therefore that it would be necessary to ascertain, by inquiry, what portion of the 10,000*l.* was properly attributable to the good-will of the business, but having regard to the fact, that Mr. *Everett* could, after the sale, carry on the same business alone, with a very slight alteration in the title of the firm, and that he could have done so on the same premises, and, in addition, that he alone had the right to continue to issue bank notes, and that he alone could confer that right upon any other person. How much of the 10,000*l.*, after estimating the value of all those rights, would remain to divide between Mr. *Everett* and the estate of the testator it is impossible for me to state.

I am of opinion, that this would be the right of the Plaintiff, and, if there were nothing further in the case, I should simply make a declaration to that effect. But it appears that, the testator having died in *July*, 1856, his capital in the concern was retained until *November* following, when it was paid to two of his executors with interest from the death of testator down to that time. I am of opinion, that the interest must be taken as paid in lieu of the profits made by the testator's capital during that interval, and that it must be treated as having been accepted as such, and the persons who accepted it cannot now give it up, and require a share of the profits in lieu of it. I also find, that the business was sold by Mr. *Everett* to Messrs. *Pinckney* in *January*, 1857, and that this was known to the Plaintiff and to the executors not later than *March*, 1857, and in that month a balance-sheet, including the profits down to the death of the testator, was sent by Mr. *Everett* to the executors, who appointed a person to examine the accounts. The books at the bank were examined in *May*, for the purpose of ascertaining whether the account was correct, and in *November* the two executors

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cutors adopted the account, and it was settled by Mr. *Everett's* paying them the testator's capital and share of the profits due at his death, and interest from that time in lieu of profits.

I am of opnion that the settlement in *November*, 1857, followed by the payment of the balance with interest on it, finally concluded the account between the estate of Mr. *Smith* and Mr. *Everett*, in respect of the testator's capital, and share of the profits up to that day.

That settlement of accounts was made by the two executors alone, but I am of opinion that it concludes the Plaintiff, and for this reason:—two out of the three executors joined in that transaction, and it is a settled principle with respect to the power of executors, that any one of several executors may settle an account with a person accountable to the estate, and that such settlement is binding on the other executors. In *Herbert* v. *Pigott* (*a*), executors brought an action against a debtor to the testator's estate; two of the executors released the debt; and it was held to be binding. Although a question, which I apprehend is now settled, has been raised, whether the same principle extends to one of several administrators, still there can be no question that one of several executors has power to act so as to bind the estate, subject of course to any question of his liability to the parties interested in the estate for any impropriety of conduct, and subject to this also, that if there be any fraud or gross error in the settlement of the account it may be a ground for re-opening it.

I am of opinion, that the two executors had power to bind the Plaintiff in his settlement of accounts in *November*, 1857, and that she is bound thereby; but I wish

(*a*) 2 *Crompton & M.* 384.

wish to read the evidence, in order to ascertain whether that settlement of account included or was intended to include that portion, however small it may have been, of the good-will which belonged to the estate of the testator. If the two executors considered they were settling all the claims of the estate of the testator, including everything relating to the partnership, I should be of opinion that it concluded the matter.

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June 20.

The perusal of the evidence does not satisfy me that the good-will of the business, or so much of it as belonged to Mr. *Smith*, was included in the settlement of accounts of *November*, 1857. It is clear that the solicitors of the two executors thought there was nothing more to be settled, and they probably thought that the good-will was worth nothing, and probably it was worth but little, after making the deductions and with the qualifications which, on a former occasion, I stated must be made. I consider that the burthen of proof lies on Mr. *Everett* to shew that the value of the good-will was included, and, at present, he has not done it. I shall therefore direct the following inquiries:—

First. Whether the settlement of the 5th of *November*, 1859, included the good-will belonging to the testator in the business? And if it shall appear that it was not so included, I shall declare that the estate of *Smith* is entitled to so much of the 10,000*l.* as was paid in respect of *Smith's* share in the good-will of the business.

I must then direct an inquiry how much of the 10,000*l.* was paid in respect of the share of Mr. *Smith* in

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in the good-will of the business, having regard, in making such inquiries, to the following facts:—

1. That the premises in which the partnership business was carried on belonged to the Defendant Mr. *Everett*.

2. That the Defendant Mr. *Everett* was entitled to carry on the business of a banker at *Salisbury*, in the same premises, after the good-will had been sold.

3. That there survived to Mr. *Everett* the sole and exclusive right of issuing notes.

NOTE.—By the certificate, dated the 22nd of *December*, 1859, it was found, first, that the settlement did not include the good-will; and secondly, that, having regard to the facts stated in the decree, 2,000*l.* was paid in respect of the share of Mr. *Smith* in the good-will of the business.

1825.
Jan. 5.

Before *Lord* ELDON.

COOK *v.* COLLINGRIDGE.

Form of decree in *Cook* v. *Collingridge* (*Jacob*, 607), containing a declaration of the rights of surviving partners to carry on the same trade, after the sale of the partnership premises and business; but that, notwithstanding this, the chance of a purchaser of the partnership property to retain the old customers could not be treated as of no speculative value.

THE decree, after reciting that the Defendant *James Collingridge*, *Thomas Rowley*, *George Mansell* and *William Cook* presented their petition on the 16th of *November* last, setting forth that the Plaintiff filed his bill, stating the partnership articles, the death of *William Cook*, and after stating the decree of the Vice-Chancellor in 1821, and of the Lord Chancellor on appeal in 1823, and the subsequent discussions for a compromise, proceeds in the following words:—

"That during these discussions, the Plaintiff abandoned his proposal for a sale by auction, and sent in a second state of facts, consenting to a valuation and that *good-will* should form part of such valuation. That thereupon, that is to say, on the 18th *December*, 1823, in order to prevent any misconception, the Petitioners *James Collingridge*, *William Cook*, *Thomas Rowley* and *George Mansell*, concurred in a state of facts and proposal, thereby insisting that as to a sale of the said partnership property and effects, the *good-will* ought not to be included in the valuation, and that if it was intended that it should be so included, the Petitioners would not accede thereto. That the Master permitted the Plaintiff to examine witnesses upon interrogatories, and which occupied until the month of *June*, 1824. That the Master has made his report, in pursuance of the decree, and has thereinafter stated,

stated, as therein has been set forth, further states, that three several proposals have been laid before him for disposing of the partnership property and effects, and by the proposal laid before him on the part of the Defendants *James Collingridge*, *Samuel Collingridge* and *William Cook*, as such executors as aforesaid, it was proposed, that the property and effects should be sold to the Defendants *James Collingridge*, *Thomas Rowley*. *George Mansell* and *William Cook* (who were then in the partnership in the trade of a coachmaker), at a valuation and appraisement, and that such valuation as to the leasehold houses, shops and warehouses should be made by indifferent persons, to be approved of by him the said Master, and nominated in manner following," [stating the mode proposed,] "and that the valuation and appraisement of the other partnership stock, materials, articles and effects should be made" in the same manner. "And the said Master further stated, that by the proposal laid before him on the part of the Defendants *Charles Lloyd Gray* and *Maria* his wife, and the infant Defendants their children, it was proposed, that a valuation should be made forthwith of the whole of the said partnership stock, *good-will* and leases and effects, distinguishing therein the several accounts of the valuation of the leases, *good-will*, stock and effects, such valuation to be made with his the said Master's approbation in manner following," &c. "And the said Master further stated, that by the third proposal laid before him on the part of the Plaintiff, it was proposed, that the whole partnership property, leases, *good-will* and effects should be sold by public auction, in such lots and under such conditions as might appear to be proper. But the Plaintiff has since proposed, that preparatory to the sale to be made in manner aforesaid (if a sale should be made) by valuation, the valuers should be instructed as to the relative situation of the different parties, and in the prices to be paid they are to include a reasonable value for the *good-will* of the said partnership. And the said Master further stated, that the Defendants *James Collingridge*, *Thomas Rowley*, *George Mansell* and *William Cook* (as partners) have, in a state of facts brought in before him, stated, that they were willing to become the purchasers of the said partnership property and effects by valuation; but if it be intended that the valuers are to take into consideration the profits of the partnership trade, and to estimate, in the name of *good-will*, a value thereon, or upon the said trade in any other way, then they decline becoming the purchasers of the said partnership property and effects, and upon consideration of the said several proposals and states of facts, and of the evidence laid before him in support of the said proposals, the Master stated his opinion, that in case the Court shall think *good-will* ought to be estimated in the valuation of the said partnership property and effects, it will be most beneficial for all parties that the whole thereof should be sold at a valuation; but if, under the circumstances of this case, this Court should be of opinion that

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that *good-will* ought not to be included in such valuation, then he was of opinion that it would be most beneficial for all parties that the whole of the said partnership property and effects should be sold by public auction. That the Petitioners have every reason to believe that the said Plaintiff is desirous of delaying any sale of the said premises, in order to enable him to partake in the profits of the said business during the progress of this cause, which he has already done for nearly seven years, the partnership between the testator and the Petitioners *James Collingridge*, *Thomas Rowley* and *George Mansell* having expired on the 31st *December*, 1817, and therefore praying, that the whole of the partnership property and effects might be forthwith sold by public auction, with such directions as to his Lordship should seem meet, and that the Petitioners, or any of them, might be at liberty to bid for and become the purchasers of the partnership property and effects, or such parts thereof as they shall think fit, and that the same might be duly conveyed, assigned and delivered to and vested in the Petitioners or any of them, in the event of their becoming such purchasers, and that all and every necessary directions might be given for the purposes aforesaid." *Whereupon* all parties concerned were ordered to attend his Lordship, and upon hearing, &c. &c.

HIS LORDSHIP DOTH ORDER, that, with the following declarations and direction, it be referred back to the Master to review his report, viz.:—*His Lordship doth declare*, that in this case the partnership expired by effluxion of time, and that there exists no obligations restraining the partners, or any of them, from carrying on the same business or trade as that in which they were engaged in the partnership which has so expired, and forming a new establishment or establishments in the same business or trade, after the sale of the business or trade of the late partnership is made: *And his Lordship doth declare*, that there exists no obligation upon any of the said partners to restrain them from uniting in a new partnership after such sale, in the said business or trade, with any other of the said partners, or any other persons, after such sale: *And his Lordship doth declare*, that the claim, therefore, to have any estimated value put upon any subject that can be considered as described by the term *good-will* cannot be supported upon the same grounds or principles as those upon which a compensation or value was, in this establishment, received from a partner buying the share of a partner going out of business of this establishment, and retiring from trade and business altogether: *And his Lordship doth declare*, that, in this case, if the property of the present establishment is sold, and the present partners, or any of them, with any other or others of them or other persons, engage in a new establishment carrying on the same trade or business (which they are fully at liberty to do), it is obvious, that if by *good-will* is meant the value of the chance that the customers of partners retiring

retiring altogether will deal with those who purchase from such retiring partners and succeed to their establishment, a *good-will* of that nature cannot be valued on the same principle, as where the persons retiring, but not retiring altogether, from trade, have also a chance, and a great chance, of carrying the old customers into their new establishment, which must most materially affect, if it does not destroy, the chance that the persons purchasing the old establishment will retain many of the customers of the old establishment: *And his Lordship doth declare*, that, on the other hand, though the value of the chance that such customers can be retained by those who purchase the old establishment cannot be the subject of estimate, it was going on too far, to hold that chance is to be treated as of no speculative value, or of none, to be regarded in the sale: *and doth declare*, it therefore appears to be reasonable, that if the partners in the old establishment are to be allowed to stand amongst the proposed purchasers of its property, in order to bring the interests to sale fairly (which interests include the real property and leasehold and all other tangible subjects, and the contracts for building coaches, and contracts for jobbing coaches, or any interests besides that can be enumerated as belonging to the said subjects of sale not under the term *good-will*), other persons proposing to buy should have as reasonable good information as the present partners, if they propose to buy; and if, in addition to the specification of articles which can be enumerated, they are informed of the last three or four years' profits, and who are the persons that are the customers of the present concern, they may then speculate (as far as the nature of the transaction can admit of them speculating) prudently, what they will give for the chance of retaining the old customers, or any of them, having regard to the fact that the old partners are, or some of them are, about to engage in the same business, and may attract to their new establishment those customers, many or some of them: *And doth declare*, that no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a Court could prevent their so engaging: *And doth declare*, that in this case, as it appears to this Court to be circumstanced, the valuation and estimate is and can only be that which every bidder, according to his own speculations, can fancy to be the worth of his chance of retaining old customers, and their not following the old partners, or any of them, into a new establishment: *And doth declare*, that it seems to this Court also, in the circumstances of this case, to be advisable to allow the old partners, or any of them, or any persons interested, to bid for or propose to be buyers of the concern." (*a*)

(*a*) *Reg. Lib. A.*, 1824, *fol.* 561.

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MACLAREN *v.* STAINTON.

July 9.

The manager of a chartered company bequeathed ten shares, specifically to his son. After the testator's death, a large sum was recovered by the company from his estate, under a compromise sanctioned by the Court, in respect of the testator's defalcations. The company thereout declared a large *bonus*:—*Held*, that such *bonus* did not belong to the specific legatee, but that it formed a portion of the residue.

THE testator, *Henry Stainton*, died in *December*, 1851, possessed, amongst other property, of 100 shares in the *Carron Company*, which was a Scotch corporation.

By his will, he specifically bequeathed ten *Carron Company* shares to his son, *Henry Tibbats Stainton*, and ten others to his son, *James Joseph Stainton*.

The testator, *Henry Stainton*, was the *London* manager of the company from the year 1808 to his death. After his death, the company made great claims against his estate, in respect of alleged fraudulent dealings by the testator in his lifetime, and the company, by virtue of their deed of settlement, claimed a lien on the testator's shares, and refused to transfer them to the executors.

At the hearing of the cause in *July*, 1857 (see *Stainton* v. *The Carron Company* (*a*)), the accounts were opened, and a decree made for taking the accounts between the testator and the company from 1825. A compromise was afterwards proposed, and was sanctioned by an order of the Court, dated the 14th of *May*, 1858, by which the executors of the testator paid to the company a sum of 220,000*l.* in discharge of their claims under the decree, and on payment, the company were to transfer the testator's shares to his executors. This

(*a*) 24 *Beav.* 346.

This was carried into effect; the twenty shares specifically bequeathed were transferred to the testator's sons.

In consequence of this large accession to the funds of the *Carron Company*, a *bonus* of 470*l.* per share was declared on the 26th of *May*, 1858. The *bonus* thus accruing in respect of the twenty shares specifically bequeathed to the testator's two sons amounted to 9,400*l.*, and that on the remaining shares of the testator to no less than 38,070*l.* The question now argued was, to whom this *bonus* of 9,400*l.*, attributable to the twenty shares bequeathed specifically to the sons, belonged.

Mr. *Follett* and Mr. *Waller*, for the Plaintiffs, the executors, argued that the *bonus*, in this particular case, formed part of the general residuary personal estate, for it consisted of the defalcations of the testator in his lifetime, which ought to be made good prior to the transfer to the legatees. That it could not be considered as profits made subsequent to the testator's death, and attaching as such to the ownership of the shares, for it was clearly the profits of past years, kept from the shareholders by the fraudulent conduct of their manager.

Mr. *Lloyd* and Mr. *Appach* supported the same view.

Mr. *R. Palmer* and Mr. *Lewin*, for *Henry Tibbats Stainton*, argued, that the specific legatees of the shares were entitled, on the testator's death, to have them transferred, and to receive all the benefits accruing thereon subsequently; that the *bonus*, therefore, belonged to them, and not to the residuary legatees. That the general personal estate of the testator was bound to answer and make good all his obligations and liabilities,

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and, amongst them, the debt due and admitted by the company to be due to the company; *Addams* v. *Ferick* (*a*); *Armstrong* v. *Burnet* (*b*). That whatever the company recovered was divisible amongst the then existing shareholders, and that this being a public company, the shareholders had no right to any dividend until it had been declared; that the consideration of the source from which a dividend or *bonus* was derived could not be entered into by this Court, nor could the accounts or affairs be scrutinized; for if it were otherwise, the Court might be called on to unravel all the transactions of a public company, in order to ascertain precisely what part of its assets consisted, from time to time, of capital and what part of income or profits. That this could not be done, and that the only mode of determining what was income therefore depended entirely on the declaration of the company itself as to what were profits.

Mr. *Shapter* and Mr. *Haynes*, for some tenants for life of shares of the residue, also contended that the *bonus* was income, and not capital.

The MASTER *of the* ROLLS.

I am of opinion that the specific legatee is not entitled to any portion of this *bonus*. The general principle of the cases nobody can dispute, that *bonuses* which accrue after the death of a testator, upon shares specifically bequeathed by him, belong to the specific legatee. About that there can be no question. But here the state of the case is this:—a testator specifically bequeaths some shares in the *Carron Company* to his sons, and he dies not knowing that there is a penny due from

(*a*) 26 *Beav.* 384. (*b*) 20 *Beav.* 424.

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from him to the company. A suit is instituted shortly after his death, for the purpose of making his estate liable for what must be called misconduct towards the *Carron Company*, and in respect of which, it may it be said, his residue has had the benefit. That suit does not come to a final decision as to the amount due, but at the hearing, the Court determined that an account must be taken upon a certain principle in order to ascertain what was due from his estate to the *Carron Company*. A compromise is entered into, with the sanction of the Court, between the company on the one hand, and the estate, represented by the executors, on the other. By this the amount to be paid to the company in respect of their claim upon the estate is settled at 220,000*l.* and that sum is accordingly paid. The Court, being called upon to sanction this arrangement, was bound to take all these matters into its consideration; they were all within its knowledge, but whether they were expressly brought before it by affidavit, I do not know. The Court cannot ignore these facts because they formed the ground on which it proceeded, and they must have been brought judicially to its attention. The Court, then, in considering the propriety of the compromise, must have taken into its consideration this very material ingredient:—that the result of it would be, to produce a *bonus* on the shares of the company, and that as the testator possessed 101 shares, a very large portion of the 220,000*l.*, which was to be paid out of the testator's estate for the compromise, would come back to it again in the shape of a *bonus*. The Court wishing to leave the parties interested under the will in exactly the situation in which they were, would have said, if nothing is to come back to the estate from the company, a much smaller sum ought to be paid. About 47,000*l.* is returned, and deducting that sum from the 220,000*l.* you get 173,000*l.* as the balance actually paid by the testator's

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tator's estate. The Court might easily have said, the compromise shall be entered into, but on the footing that nothing is to come back to the estate of the testator. Can that alter or vary the rights of the parties? If the Court had been of opinion that the payment of the balance and the abandonment of any *bonus* was the only basis on which the compromise could properly be entered into, or if the company had said that this form of compromise was the most convenient to them, would that have altered the rights of the parties? I suggested, during the argument, that this mode of making the compromise, if the effect of it be to give the *bonus* upon the 10 shares to the legatee, will practically be nothing more than transferring a part of the residue to the specific legatee. It is true that the money passes through the company, but suppose the amount to be 4,700*l.*, does it matter, whether the actual bank notes which are paid by the executors out of the residue to the *Carron Company* are afterwards handed over to the specific legatee, though it is easily possible to conceive that such might be the case. The principle is exactly the same, it is, in point of fact, nothing more than a species of shuffling of the cards, by which a certain portion of the residue is transferred to the specific legatee.

I am of opinion that this prevents the application of the cases cited, and that the Court would not have authorized an arrangement in such a form as would indirectly give a benefit to a particular legatee to the prejudice of others. I am, therefore, of opinion that the *bonus* must be held to belong to the general personal estate of the testator and not to the specific legatee.

NOTE.—See the cases in the note to *Gilley* v. *Burley*, 22 *Beav. p.* 641, and *Loch* v. *Venables*, *post*.

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In re THE MEXICAN AND SOUTH AMERICAN MINING COMPANY.

LUND'S CASE.

March 4.

The shares of a company were transferable by delivery. After the company was in difficulties and a few days before an order was made to wind it up, a shareholder transferred his shares to his foreman. The Court, thinking that the transfer was not *bonâ fide*, *Held* that it was inoperative, and that the transferror was a contributory.

THE "*Mexican and South American Mining Company*" was established in *London*, in 1835, for mining purposes in *Mexico* and *South America*. It was what is termed "*a scrip company*," having no deed of settlement, the only regulations, as to the company, being endorsed on the scrip certificates. The company was established prior to the passing of "The Joint Stock Companies Registration Act (*a*)," and had neither been incorporated by act of parliament nor by royal charter. Scrip certificates were signed by three directors, and were transferable by delivery; these certificates stated, that the holder thereof was entitled to a specified number of shares in the company.

Mr. *Lund* had in 1853 and 1856 become the purchaser and was the holder of one hundred 10*l.* shares in the company, on the faith, as he stated, of representations as to the prosperous condition of the company. He attended a meeting on the 6th of *November*, 1857, at which it was stated that the liabilities of the company in *England* were 113,000*l.*, and that their assets were 178,000*l.*, leaving a surplus of 65,000*l.* It was also stated, that bills to a large amount had been accepted by the directors and were about to become due, and that to meet these bills cash must be provided at once. It was proposed to make a call of 3*l.* a share; but

(*a*) 7 & 8 *Vict.* c. 110.

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but no conclusion was come to, except that a meeting of the shareholders on the 12th of *November* should be called, to consider the expediency of winding up the company.

On the next day (the 7th of *November*, 1857), Mr. *Lund* transferred his shares to his foreman, *William Edward Hipkins*, in consideration of 2*s.* 6*d.*, who accepted the certificates. Mr. *Lund* told the secretary on the 8th of *November*, that he had sold his shares, but he was permitted to attend the meeting of the 12th of *November*, though he took no part in the proceedings.

On the 12th of *November* the expediency of winding up the company was resolved on; and on the 24th of *November*, an order for winding it up was made.

The chief clerk placed Mr. *Lund* on the list of contributories for one hundred shares, and Mr. *Lund* now moved to have his name removed from the list.

The affidavit of Mr. *Lund* (after referring to the meeting of the 6th of *November*) stated as follows:—

"That on reviewing the whole of the proceedings, and not liking the manner in which the said company was being carried on, and believing that the directors were acting recklessly in the management, I felt that my shares were of little or no value, and likely to be a source of trouble and annoyance, and I determined to disconnect myself from the said company, to sell my shares, and submit to lose my paid-up capital. On my arrival at my place of business on the morning of the 7th of *November*, 1857, I sent for the above-named *William Edward Hipkins*, one of the persons in my employ, and told him I held in my hands one hundred 10*l.* scrip shares in the *Mexican and South American Company*,

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pany, on which all the 10*l.* had been fully paid up, so that no further call could, as I verily believed, be made in respect of them; my reason for so doing was, the assurance I had received to that effect from the said *Hyde Clarke* and the statements made at the last-mentioned meeting. That I then related to the said *William Edward Hipkins* the whole statement of the affairs of the said company, as placed by the directors of the company before the meeting on the previous day, showing a balance of 65,000*l.* after all their liabilities had been met. But I also told *Wm. E. Hipkins*, that I feared this statement was, to a certain extent, fallacious, and that I believed the balance in favor of the company would prove little or nothing, that the directors were trying to raise money to meet some heavy claims falling due in a few days, and to prevent myself from being induced to make any further advances in the hope of saving my capital already invested in the concern, I was willing to put up with my present loss and have no further connection with the said company. That I then offered to sell to the said *Wm. Edw. Hipkins* my said one hundred fully paid-up shares in the said company for half-a-crown, stating at the same time, that ultimately there might be something to be received in respect of these shares; but that, in any case, he *Hipkins* could not lose by them, as they were fully paid-up shares.

"That I did not then believe that there would be any ultimate loss on these shares, or that I was legally liable to be called upon to contribute, in respect of my shares, to the debts of the company, but I felt that the directors might press me to share their loss with them, and that so long as I held these shares, I should be constantly liable to annoyance from such applications, and to be placed in the unpleasant position of having

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having to refuse such demands, which, knowing, as I did, some of the directors personally, I should have felt it almost impossible to do, and that my only object in selling these shares was, by so doing, to disconnect myself from the company and get rid of the annoyance of having applications made to help the directors, as I have before stated. And I further say, that the said sale so made to the said *Wm. Edward Hipkins* was a *bonâ fide* sale of all my said shares in the said company, and that it was intended to pass and did actually pass all my right and interest in such shares, and that if, as I fully anticipated, some small amount might altimately be received on account of them, the said *Wm. Edward Hipkins*, and not myself, would most decidedly have been the person to receive the same, and could not have been called upon by me to account for any portion of it."

Hipkins, who joined in the affidavit, said, that the statements in the affidavit of Mr. *Lund* were "fully and substantially true and correct, and that the sale was a *bonâ fide* sale. That he believed the said *William Lund* was desirous of relieving himself from all applications for contributions to help the directors, he having told him so at the time of the sale to him, and that if any profit had accrued on the shares he (*Hipkins*) should undoubtedly have considered himself entitled to receive and demand the same."

Mr. *Selwyn* and Mr. *Hobhouse*, in support of the application to remove Mr. *Lund's* name from the list of contributories.

First, the company has, without the authority of a royal charter or act of parliament, assumed a corporate character and the right to issue shares, passing by delivery. Such an association is illegal, as was argued in

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in *Barclay's Case* (*a*), and persons who have been induced to take shares in it, on the misrepresentations of the company and its officers, are not liable as contributories; *Brockwell's Case* (*b*); *Bell's Case* (*c*); *Duranty's Case* (*d*).

Secondly. By the common contract between the company and the shareholders, the shares were transferable by delivery, and it was stipulated that a shareholder should have the right of getting rid of his liability by a transfer of the shares. Mr. *Lund* incurred his liability simply by the transfer to him, he had, therefore, a right to get rid of it by the same means. This was held in *Sutton's Case* (*e*); *Fenn's Case* (*f*); *Birch's Case* (*g*); *Jessopp's Case* (*h*); and see *De Pass's Case*, before the Lords Justices, 27th *July*, 1859.

The state of the concern and of the liabilities of the company are immaterial. No question arises, upon a winding up, as to the liabilities of shareholders as regards creditors, but only those between the contributories *inter se*, and, upon the sale and transfer of the shares to *Hipkins*, he alone, by the partnership contract, became liable to all the liabilities and entitled to all the benefits of the concern.

Mr. *Lund* had a right to get rid of a liability to which he was only subject so long as he held the shares. The case is analogous to that of the assignee of a leasehold, who continues liable on the covenants so long only as he remains assignee. He is justified in assigning to a pauper; and in *Rowley* v. *Adams* (*i*) Lord *Cottenham*, after referring to *Onslow* v. *Corrie* (*k*), as shewing that the assignee

(*a*) 26 *Beav.* 177.
(*b*) 4 *Drewry*, 205, *and see* 2 *De Gex & Jones*, *p.* 283.
(*c*) 22 *Beav.* 35.
(*d*) 26 *Beav.* 268.
(*e*) 3 *De G. & Sm.* 262.
(*f*) 4 *De G., M. & G.* 285.
(*g*) 2 *De G. & Jones*, 10.
(*h*) 2 *De G. & Jones*, 638.
(*i*) 4 *Myl. & Cr.* 534.
(*k*) 2 *Madd.* 330.

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assignee of a lease had a moral as well as a legal right to relieve himself from the obligations of the covenants in a lease, held, that executors were personally liable for not having taken steps to get rid of their testator's liability as assignee of a leasehold, after having been directed by an order of the Court so to do.

Mr. *R. Palmer* and Mr. *Roxburgh* for the Official Manager, and Mr. *Southgate*, for the creditors' representative, were not heard.

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I am satisfied, on the statement of Mr. *Lund* himself, that this was not a *bonâ fide* sale of the shares. I am satisfied that, not being able to dispose of them in the market, he sold them to a person entirely under his own control, for the express purpose of getting rid of his liability. The case of *Ex parte Jessopp* (*a*) puts it on the *bona fides* of the sale, and where there is a *bonâ fide* sale, the Court will act on it; but if the transaction is tainted with anything unfair, the Court will not recognize the transfer.

In *Jessopp's Case*, a shareholder of the company had proposed that the company should be wound up; but an arrangement was made for the resuscitation of the company through Mr. *Sherridan*. *Jessopp* disapproved of it, and thought the company ought to be wound up. Lord Justice *Turner* says (*b*), the appellant "was in this position: the majority of the directors determined, against his will, to adopt the arrangement, and he had no remedy but to transfer his shares or to wind up the company." Under these circumstances he transferred his

(*a*) 2 *De Gex & Jones*, 638. (*b*) *Page* 649.

his shares to *Spence*, as nominee of *Sherridan*, who was a responsible person.

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This is quite a different case. On the 6th of *November* it was proposed to wind up, and the order for that purpose was actually made on the 24th; but in the meantime Mr. *Lund* sells his shares to his foreman, who had been twenty years in his service, for the express purpose of getting rid of his liability. That cannot be treated as a *bonâ fide* sale; it is different from a sale in the market; this case therefore rests where it was before the transfer. I concur in the observations of Lord Justice *Turner*, that the question is, whether there has been a *bonâ fide* getting rid of shares; I do not think this was. *Lund* is therefore liable as a contributory.

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ARMSTRONG *v.* JEFFREYS.

March 24.

The costs of all parties were, in 1857, ordered to be taxed and paid out of a fund in Court, and the residue was directed to be paid to the parties entitled. Solicitors, who had acted for some Defendants down to 1840, had no notice of the order, and their costs had been omitted in the taxation. Upon their petition, these costs were ordered to be taxed and paid by the parties to whom the residue of the fund had been paid over.

MESSRS. *KINDERSLEY* & Co. acted as solicitors in these suits for *William Gordon* (one of the executors of the testator) down to his death in *May*, 1837, but they were not concerned for his administrator *Jeffreys*, against whom the suits had been revived.

They also acted as solicitors in the suit for *Anthony Morris Storer*, *Elizabeth Storer*, *Ann Storer* and *Margaret Storer*, down to *August*, 1840, but they took no

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no proceedings for them after that time, though they were not formally discharged.

By the decree for further directions, made on the 2nd of *August*, 1858, the costs of all parties of the said suits were ordered to be taxed and paid out of the funds in Court.

The costs of the Defendants *Anthony Morris Storer*, *Elizabeth Storer*, *Ann Storer*, *Margaret Storer* and *Evelyn Bazalgette* were ordered to be paid to Mr. *George Burrow Gregory* (who was stated in the decree to be their solicitor); but no direction was given as to the payment of *William Gordon's* costs; and the residue of the funds in Court were ordered to be paid to the Plaintiff *Armstrong* and the Defendant *Bazalgette*; and any of the parties were to be at liberty to apply to this Court as they might be advised.

The costs were taxed and paid, but they did not include the costs of Messrs. *Kindersley* & Co., who were not aware of the proceeding. The residue was paid over, as directed by the order, to *Armstrong* and *Bazalgette*.

Until *November*, 1858, Messrs. *Kindersley* & Co. had not become aware of the proceedings which had taken place in the suits, but they then ascertained that one of the firm of Messrs. *Gregory* (the solicitors of Mr. *Bazalgette*) had acted as solicitors for the four *Storers*, though no order had been obtained to change solicitors.

Messrs. *Kindersley* presented the present petition, praying a reference to the Taxing Master to tax, as between solicitor and client, the costs of the late Defendant *William Gordon* of the first and second above-mentioned

mentioned suits, and the costs of the Defendants *Anthony Morris Storer*, *Elizabeth Fanny Storer*, *Ann Storer* and *Margaret Storer* incurred in the second above-mentioned suit in and prior to the month of *August*, 1840; and that the amount of such costs, when taxed, might be paid to them by *Armstrong* and *Bazalgette*.

Mr. *Osborne* and Mr. *Wolstenholme*, in support of the petition, cited *Ezart* v. *Lister* (*a*).

Mr. *Lloyd* and Mr. *Stevens*, *contrà*.

The MASTER *of the* ROLLS ordered the taxation, as between solicitor and client, of the costs of the Defendants *Anthony Morris Storer*, *Elizabeth Storer*, *Ann Storer* and *Margaret Storer* incurred in the second suit in and prior to the month of *April*, 1840, and the costs of this application, and that the amount should be paid by *Armstrong* and *Bazalgette* out of the funds in their hands. But no order was made as to the costs of *William Gordon*, the decree not having made provision for the payment of his costs to any solicitor (*b*).

(*a*) 5 *Beav.* 585. (*b*) *Reg. Lib.* 1858, *A.*, *fol.* 1272.

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Where a witness objects to answer, on the ground that he may subject himself to penalties, he must, in many instances, be the only one to determine on his liability; but when the facts disclosed raise a point of law as to his liability, the Court must decide it.

A joint stock company whose shares are represented to be transferable by delivery, is not necessarily illegal at common law.

A joint stock company established without act or charter in 1835, and prior to the Joint Stock Companies Registration Act (7 & 8 *Vict.* c. 110), does not, upon an alteration in the shareholders subsequent to that act, require registration.

The case of *Blundell* v. *Winsor* (8 *Sim.* 60), commented on.

A stockbroker *held* bound to discover the names of the persons for whom he had purchased shares in a joint stock company which had neither been incorporated, chartered or registered, and which was regulated by no deed of settlement, and whose shares passed by delivery.

THIS company was formed in 1835, without any deed of settlement; it was neither incorporated by charter or act of parliament, nor was it registered under the 7 & 8 *Vict.* c. 118.

The shares passed by delivery, the certificates issued by the directors stating, that "the *holder* of this certificate having paid 5*l.* to the directors of the *Mexican and South American Company*, will be entitled to shares on his making the following payments," &c.

The undertaking proved unsuccessful, the whole capital was lost, and in the month of *November*, 1857, an order was made for winding-up the company under the 11 & 12 *Vict.* c. 45, and the 12 & 13 *Vict.* c. 108. The official manager, having learnt from the books of a deceased broker of the sale by him of a number of shares, applied to the purchaser's broker for the name of the purchaser, and, being unable to obtain it, he summoned the purchaser's stock broker before the Examiner to produce his books and give evidence.

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The stock broker accordingly attended, and the following examination took place:—

Question. Have you ever bought any scrip certificates or shares in the *Mexican Company?*

Answer. Never for myself; and as I am advised the company is illegal, and that I may render myself liable to criminal or penal proceedings, I decline further to answer the question.

Question. Have you ever purchased any scrip certificates for any other person?

Answer. I decline to answer, fearing the consequences, as stated above, from the illegality of the company's proceedings throughout. I have no scrip certificates or shares in this company in my possession at this time.

Question. Have you had any of those scrip certificates or shares in your possession at any time since 1st *November*, 1857?

Answer. I decline to answer the question.

A motion was now made, on behalf of the official manager, that the broker might attend the Examiner at his own expense, and submit to be further examined, or be committed for his contempt.

Mr. *R. Palmer* and Mr. *Roxburgh* in support of the motion. The witness is bound to answer these questions; he says "he is advised that the company is illegal, and that he may render himself liable to criminal or penal proceedings;" but he cannot deprive a party of his right to his testimony, by simply saying that the company is illegal. That is a matter of law, on which the Court must express its opinion as to whether it would

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or would not entail penal consequences. As, for instance, if a witness were to say, "I declins to answer that question, because it may shew that five years ago I exercised an office without first taking the oaths;" the judge would be able to say as matter of law, "That cannot subject you to penal consequences, by reason of the subsequent Indemnity Acts;" *The King of the Two Sicilies* v. *Willcox* (*a*). Here it is plain that the witness would subject himself to no penalties whatever. The Bubble Act (6 *Geo.* 1, c. 18, ss. 19, 20), making (s. 19), "the acting or presuming to act as a corporate body or bodies, and the raising or pretending to raise transferable stock or stocks, and the transferring or pretending to transfer or assign any share or shares in such stock," illegal and void, and declaring (s. 20), that the "furthering, countenancing or proceeding in any such unlawful undertaking or attempt, to be" a public nuisance, has been repealed by the 6 *Geo.* 4, c. 91. Independent of that act, it is no offence at common law; *The King* v. *Webb* (*b*); *Harrison* v. *Heathorne* (*c*); *Sheppard* v. *Oxenford* (*d*), in which the demurrer to the bill was over-ruled by the Lords Justices. The witness is no shareholder himself, and "there is no privilege against disclosing matters within the knowledge of the party merely because it might subject other persons to punishment" (*e*).

Mr. *Southgate* for the creditors' representative.

Mr. *Edward James*, Mr. *Selwyn* and Mr. *J. J. Aston* for the stockbroker. A witness is not bound to answer as to any facts which may tend to criminate him, or subject him to penalties or forfeitures; *Phillips on Evidence* (*f*); *Taylor on Evidence* (*g*); *Garbett's Case* (*h*). This protection

(*a*) 1 *Sim. N. S. p.* 330.
(*b*) 14 *East*, 406.
(*c*) 6 *Man. & G.* 81.
(*d*) 1 *Kay & J.* 491.
(*e*) 1 *Sim. N. S. p.* 329.
(*f*) *Vol.* 2, *p.* 487 (10*th ed.*)
(*g*) *Page* 1131 (2*nd ed.*)
(*h*) 1 *Den. C. C.* 236; 2 *Car. & K.* 474.

tection extends to every link in the chain of proof; *Maccallum* v. *Turton* (*a*); and in a doubtful case, the Court will not expose the witness to the risk which he may incur by answering; *Nelme* v. *Newton* (*b*). It is for the witness to determine whether his answer may tend to criminate him; *Fisher* v. *Ronalds* (*c*); and faith must be given to his oath, for if it were otherwise, the statements necessary to prove his exemption would, of themselves, expose a witness to the peril which he sought to avoid. Here the witness has stated enough to protect him against giving the discovery; *Short* v. *Mercier* (*d*).

But the risk in this case is not imaginary; the company is altogether an illegal association at common law. It professes to create shares transferable by delivery, and to place the holders, for the time being, of the scrip certificates in the precise situation, and to give them all the rights and expose them to all the liabilities of the prior possessor. This can only be done by an act of parliament or by royal charter.

In *Duvergier* v. *Fellows* (*e*), a company was projected for working a patent, and to consist of 10,000 shares transferable and assignable and without a charter, it was held illegal, for "the acting as a corporation without charter from the crown is contrary to law" (*f*). In giving judgment in that case the Court said: "Although the statute of 6 *Geo.* 1, c. 18, is repealed, the common law relating to such schemes is expressly reserved by the repealing statute; and no one doubts, if it can be shewn, as it easily may, that such schemes are fraud traps and injurious to the public welfare, that the forming of them is

(*a*) 2 *Younge & Jer.* 183.
(*b*) 2 *Younge & Jer.* 186, *n.*
(*c*) 12 *C. B. Rep.* 762.
(*d*) 2 *De Gex & Smale*, 635.
(*e*) 5 *Bing.* 248.
(*f*) *Ibid. p.* 268.

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is an indictable offence at the common law." . . . "Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the king, by usurping on his prerogative," which "is considered as a criminal act" (*a*). In *Blundell* v. *Winsor* (*b*), the Vice-Chancellor of *England* expressed a similar opinion on the illegality of such a company, and held, that a joint-stock company, the shares in which were made assignable at the discretion of the holders, was illegal and fraudulent, because it trenched on the prerogative of the king, and held out that the shares could be assigned without any control or restriction whatever (*c*). Dealing in such shares is or may be an illegal transaction, and "trafficking in these shares may have been illegal at common law;" *Josephs* v. *Pebrer* (*d*) and *Jackson* v. *Cocker* (*e*).

Secondly. The sale of shares in this company is also illegal under the Joint Stock Companies Act, 1844 (7 & 8 *Vict.* c. 110). Although the company was established in 1835, still this act applies to it, for upon the death of any holder of shares, and upon every transfer, a new partnership was created by the death of the shareholder or the introduction of a new partner, and as that took place constantly after 1844, the company, on each occasion, came within the operation of the 7 & 8 *Vict.* c. 110. By the 26th section of this act, it is unlawful, until a certificate of complete registration has been obtained and the subscriber duly registered, to sell any share therein, and every person entering into a contract for the sale of such share is liable to a penalty of 10*l.* The broker is, therefore, not bound to incur such a liability.

Thirdly.

(*a*) 5 *Bing. p.* 268.
(*b*) 8 *Sim.* 601.
(*c*) *Ib. pp.* 612, 613.
(*d*) 3 *Barn. & Cr. p.* 644.
(*e*) 4 *Beav. p.* 64.

Thirdly. It is possible, that the misrepresentations made upon the establishment and in the proceedings of the company, as to the shares being legally transferable by delivery, may be considered a fraud upon the public, and that the trafficking in such shares is an indictable offence; *Josephs* v. *Pebrer* (*a*); *Duvergier* v. *Fellows* (*b*); *Blundell* v. *Winsor* (*c*). They also referred to *Barclay's Case* (*d*).

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I entertain no doubt upon this question.

There are three grounds upon which it is alleged by this gentleman that he is not bound to answer the questions put to him. The first is, that this association is illegal at common law. The second, that he would incur penalties under the 7 & 8 *Vict.* c. 110. And the third is, that he may have made misrepresentations as to the law which have induced persons to enter into engagements which may make him liable to a criminal indictment. Now the first point raises the question, whether the witness is to determine the law as to his liability to any penalty. I do not doubt the accuracy of the observation in the case cited, that in a great number of instances the witness himself must be the only person to determine that point, but certainly, where all the facts relating to it are brought before the attention of the Court, then I am of opinion that it is for the Court to determine it, because it is a mere question of law, and such is the case upon the present occasion. I therefore proceed to examine the law of the case, and to inquire whether the witness incurs any liability sufficient to justify him in his refusal to answer the question. The first

(*a*) 3 *Barn. & Cr.* 639.
(*b*) 5 *Bing.* 248.
(*c*) 8 *Sim.* 601.
(*d*) 26 *Beav.* 177.

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first argument is, that this association is illegal at common law, totally independent of any statute. Two grounds are adduced in support of this proposition, the first is, that it is illegal, at common law, for a society of persons to act as a corporation without the royal charter, and I am disposed to assent to that proposition; but, in this case, I am at a loss to discover anything that amounts to acting, or assuming to act, as a corporation. It is very difficult to define accurately what is meant by "acting as a corporation," but if the illegality be, that they do without the royal charter that which requires a royal charter to enable them to do, it can only mean doing those things which alone they would be empowered to do by the royal charter, and these are nothing more than powers to sue and be sued under a particular name, to have a common seal, and matters of that description. I look in vain to find that this company has done anything of that description. In *Duvergier* v. *Fellows* (*a*), it was admitted by the demurrer (as was observed by *Tindal*, C. J., in *Harrison* v. *Heathorne* (*b*)), that the company intended to act as a corporation, consequently it was open to that objection. It is also to be observed, that that case was subsequently affirmed by the House of Lords (*c*) upon the ground of the illegality of the assignment of a patent to more than six persons, without any opinion being pronounced upon the illegality of the company, upon which it had been put in the Court of Common Pleas by Chief Justice *Best*.

The other ground is, that there is an indefinite assignment of shares. I have listened in vain for any case, or, indeed, for the statement of any principle, whereby, at common law, and independent of any statute, a partnership

(*a*) 5 *Bing.* 248.
(*b*) 6 *Man. & Gr.* 138.
(*c*) 1 *Cl. & Fin.* 39.

ship between persons who agree among themselves that their shares shall be legally assignable *in perpetuum*, or indefinitely assignable, is absolutely void and illegal. I find no case which determines it, and no principle on which it can rest, nor am I able to conjecture why such an association should be void at common law. It does not appear to me to offend against society, or to injure any class of individuals, and, therefore, unless bound by distinct authority, I should not be the first judge to hold that such an association was void at common law.

But I find that the very point came before the Court in *Harrison* v. *Heathorne* (*a*), in which the judges distinctly held that such an association is not illegal at common law. In opposition to this, I am referred to *Blundell* v. *Winsor* (*b*), which is the only other decision, and comes very near to this case; and, singularly enough, was a decision upon the same association as that in *Harrison* v. *Heathorne* (*a*). Upon referring to the Vice-Chancellor's judgment, I think it is clear he proceeded upon this ground and that this must have been the view that he took of the case:—that the company was nothing more than a fraudulent attempt by various persons for their own benefit to draw in others to subscribe to an association under pretence that they could, at any time, get rid of their liability and dispose and so make a profit of their shares. No doubt, if that were established, it would be a fraudulent and void association.

These are the words that he uses (*c*):—"The fair inference to be drawn from the provisions of this deed is, that certain persons are to form a company, which might be increased to an unlimited extent, and that the shareholders

(*a*) 6 *Man. & Gr.* 81.
(*b*) 8 *Sim.* 601.
(*c*) 8 *Sim.* 612.

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shareholders were to have the power of transferring their shares to whomsoever they pleased, without any sort of control; the deed thereof necessarily represents, that the persons who should assign their shares would get rid of all the liabilities attached to them, and that the persons who should take their shares would take them just as the assignors held them. It is clear, however, that this could not be done. In my opinion, therefore, the deed held out to the public, as an inducement to them to become partners in the working of these imaginary gold mines, a false and fraudulent representation that they might continue partners in the undertaking just as long as they pleased, and then get rid of all the liability that they had incurred, by transferring these shares to some other person." Then at the end he says this:—"The undertaking in question appears to have been a wild project, entered into by speculative persons for the purpose of deluding the weak portion of the public of this country, who too often allow themselves to be gulled by any specious scheme that holds out a prospect of gain, and what it stated to have taken place with regard to it might have been reasonably expected, namely, that all the capital has been expended and no profits realised, but debts and liabilities incurred to a large amount."

If that was so, there was a ground upon which that judgment might be supported; but if it proceeded upon the other ground exclusively, then I am of opinion that it is at variance with the case of *Harrison* v. *Heathorn*, which I should feel disposed to follow.

That being so, and this company not being void or illegal at common law, the next question to be considered is, whether any penalty can be incurred under the 7 & 8 *Vict.* c. 110. The 26th section puts this restriction

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restriction on the disposal of the shares of joint stock companies to which that statute is applicable: "And further, with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint stock company, *the formation of which shall be commenced*" (it is important to notice those words) "after the 1st day of *November*, 1844," that they shall not dispose of their shares until the company shall have obtained a certificate of complete registration under a certain penalty. The question is, whether this company is a company "*the formation of which was commenced after the 1st of November*, 1844." Well, in ordinary parlance, if you asked when the formation of this company was commenced, you would be told that it was commenced in 1835. It was then called "*The Mexican and South American Company*," and it has professed to carry on its business ever since under the same name.

Now what did the act of parliament mean by the words "*the formation of which shall be commenced after November*, 1844?" I am of opinion that it meant what in ordinary language is meant by those words, and that it had not such technical meaning as this:—that the moment an alteration was made in the existing partnership, by a variation in one of its members, subsequently to the passing of this act, it was to be treated as a new partnership and to come within the provisions of this act: I am of opinion that the act does not provide, that in such a case, the partnership must be provisionally registered and subsequently completely registered, and that, unless those acts were performed, any person who entered into a contract for the sale of shares in it incurred the penalty mentioned in this clause. I am of opinion that the insertion of the two words "commencement of" shews the distinction between "the formation of a company" and "the commencement of the

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the formation of the company," and that distinct words were used in order to point out that it was not intended that an accidental variation in the number of the members of the company should create a new contract within the provisions of this act. Entertaining no doubt on this subject, I am of opinion that under that act no penalties whatever are incurred.

Then the only remaining ground adduced on behalf of the refusal of the witness to give his evidence was this, that a representation may have been held out by him to the world at large, that all persons might get rid of their liability by a transfer of the shares, that this is wrong in point of law, because they cannot get rid of their liability as regards contracts entered into by the company during the time they were members of it; and that this being a false representation held out to the world, upon the faith of which persons may have acted, the person making such statement may be indicted for a fraudulent misrepresentation. I am of opinion that the representation does not amount to more than this:— That there is a contract to that effect between the partners themselves. But I also feel satisfied that if it was actually so stated, and that a person had *bonâ fide* made an accidental misrepresentation of the state of the law, that circumstance would not entitle him to refuse to answer any question respecting it. If he had made any misrepresentation as to the effect of the law, fraudulently and with the view and intention of deceiving somebody, he might be indicted. But certainly according to our experience in this Court, persons are made to answer questions infinitely more stringent than the present, without anybody thinking of raising any question as to their being rendered liable to any such consequences as are here suggested.

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I am bound also to say, that I am influenced by the very serious consequences which would follow from holding the opposite view. The question as to the illegality of this company has been raised before me over and over again, both in Court and in Chambers, and I have given leave to have this question solemnly argued before me, but nobody has ventured to do so. If I were to determine, that this was an illegal association, upon the objection of a witness to answer a question, the result would be, that the *bonâ fide* transactions of a company which existed for a period of twenty years would be all unravelled, and most serious consequence would ensue, for this Court has itself distributed large sums of money under the winding-up order made in this case. I admit that this is not a reason why I should not so hold on the present occasion if I thought the witness right, but I refer to it, for the purpose of shewing it would be very dangerous, collaterally and as it were by implication, to decide a question which no one has thought it fit to bring directly before me.

I am of opinion, both on the principles of the common law and on the Act of Parliament, and on the cases, that there is no justifiable ground on which this gentleman can refuse to answer these questions. I determine the question upon the statute, without taking into consideration the fact, that it is, in this respect, a penal act and must therefore be construed most strictly.

NOTE.—Affirmed by the *Lords Justices*, 1st *June*, 1859.

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THOMPSON *v.* ROBINSON.

Nov. 18.

A testator devised an estate to one for life, and afterwards to be sold, and the proceeds equally divided between "his surviving nephews and nieces." He had, in another part of his will, designated *A.* and *B.*, (who were really his great nephew and great niece,) as his nephews and nieces:—*Held*, that *A.* and *B.* did not participate in the proceeds.

THE testator devised some hereditaments at *Fell Dyke* and at *Moorfield* to his sisters *Mary* and *Ann*, successively, for life, and afterwards to his nephew *Joseph Pearson*. But if *Joseph Pearson* should not survive the testator's sisters (which happened), he directed the estate to be sold "and the proceeds equally divided among his surviving *nephews and nieces*."

In a previous part of his will, the testator had bequeathed one-third of the proceeds of another property "*to his nephew and niece John and Sarah Pearson*," who were, in fact, his great nephew and great niece, they being the children of a deceased nephew *William Pearson*.

The testator died in 1837; his surviving sister died in 1856, and *Joseph Pearson* having died previously, in 1847, the estate became saleable.

At the decease of the surviving sister in 1856, there were five nephews and nieces and seventeen great nephews and nieces surviving her.

The *Fell Dyke* estate had been sold, and the question was to whom the produce belonged. *John* and *Sarah Pearson*, the great nephew and great niece, who were living, claimed a share.

Mr. *Selwyn* and Mr. *T. A. Roberts*, argued, that the five surviving nephews and nieces alone participated in the produce of the estate, which had been given expressly to "nephews and nieces" only. That the circumstance

cumstance of the testator having, in another passage in his will, incorrectly designated two named persons, who were his great nephew and a great niece, as "his nephew and niece *John* and *Sarah*," did not enlarge the strict and proper meaning of the words "nephews and nieces," and extend the class of un-named persons so as to include either all the great nephews and nieces, or those previously named. That the case was governed by *Shelley* v. *Bryer* (*a*); *Smith* v. *Lidiard* (*b*).

Mr. *Karslake*, for *John Pearson* the great nephew, and Mr. *C. Hall*, for the great niece, argued, that they took a share of the fund, for a great nephew and niece really were nephews and nieces, and were, therefore, included in those expressions.

Secondly. That the testator had, by designating these two person as his nephew and niece, put a clear construction on those words, and explained his own meaning and intention when subsequently using them. That, therefore, this case came precisely within the decisions in *James* v. *Smith* (*c*); *Owen* v. *Bryant* (*d*).

The MASTER *of the* ROLLS was of opinion, that it could not be inferred, from the erroneous description of the two named individuals in one part of a will, that they were intended to be included in another gift to a class to which they did not properly belong. That there being persons to whom the words "nephews and nieces" were properly applicable, the class could not be extended.

He decided that the five surviving nephews and nieces were alone entitled.

(*a*) *Jacob*, 207.
(*b*) 3 *Kay & J.* 252.
(*c*) 14 *Sim.* 214.
(*d*) 2 *De G., M. & G.* 697.

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Dec. 6.

CARVER *v.* RICHARDS.

Where an intention is established to pass property which is the subject of a power, a Court of Equity will give effect to the disposition, and hold that the property passes under it, although the intention to dispose of it by means of the power is not shewn.

A married lady had a power to appoint under a deed of 1807. An invalid and fraudulent deed of 1813 purported to give to her and her husband a joint power of appointment over the same property. They executed the latter power in 1820, reserving a power of revocation and new appointment to the lady. In 1829, after the death of her husband, she professed to execute the power contained in the deed of 1820, and all powers in the deeds therein recited, and all other powers enabling her, and she confirmed the appointment of 1820, which was in favor of legitimate objects of the power under the deed of 1807. The deed of 1807 was recited in the deed of 1820:—*Held*, that the deed of 1829 was a valid execution of the power contained in the deed of 1807.

UNDER a settlement dated in 1807, an estate called *Llwynypeod* stood limited to Mrs. *Carver* (the wife of *Daniel Carver*) for life, with remainder to all or any of her children as she should appoint, with remainder to all her children as tenants in common in tail.

On the 16th of *July*, 1813, Mrs. *Carver*, having several children, executed this power, and appointed the estate to her eldest son *Richard Carver* in fee, subject to her life estate therein.

On the 19th of *July*, 1813 (three days afterwards), *Richard Carver*, as part of the same transaction, executed a deed, which was made between himself and trustees. It recited that the appointment of the 16th of *July*, 1813, had been made in pursuance of an agreement between *Daniel Carver* and *Sarah* his wife and *Richard Carver*, that the *Llwynypeod* estate should be forthwith settled and assured to, for and upon the several uses, trusts, intents and purposes thereinafter mentioned. It then *witnessed*, that in pursuance and performance of his agreement, *Richard Carver* conveyed the estate to the trustees (subject to the life estate of *Sarah Carver*), to the intent that his father *Daniel Carver* should, during his life, receive out of the rents thereof a yearly rent of 200*l.* after the death of *Sarah Carver*,

Carver, and, subject thereto, to the use of all or any of the children of *Daniel Carver* and *Sarah* his wife as they should jointly appoint, or as *Sarah Carver*, in case she survived *Daniel Carver*, should appoint.

In 1820, *Daniel Carver* and his wife, on the assumption that the two deeds of 1813 had given them a joint power of appointment, and in execution of their powers reserved to them by the second deed of 1813, appointed the estate amongst all the children of their marriage, giving certain portions to each, and apportioning the annuity to their father, so as to charge certain proportions thereof on each of the pieces so apportioned to the children. *This deed recited the settlement of* 1807, and contained a power of revocation and new appointment, reserved to Mr. and Mrs. *Carver*, and to Mrs. *Carver* if she survived, to re-appoint the estate to the children of their marriage.

In 1826, another deed was executed by them, which, however, did not affect the question. It altered the previous dispositions in a manner not considerable, it confirmed the prior limitations, except as altered, it preserved the annuity of 200*l.* a year to the husband, and it retained the power of revocation and new appointment.

Daniel Carver died in 1827.

Afterwards, on the 16th of *May*, 1829, *Sarah Carver* executed a deed-poll. It recited that she and her husband had executed the deed of 1820, "and by virtue of the powers and authorities therein recited," appointed the estates to their children, chargeable as therein mentioned, and with a power of revocation and new appointment to her seven children limited to her thereby. It then

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then recited the deed of 1826, and the power of revocation and new appointment to her seven children reserved to her thereby. It then recited the death of her husband, and that, "in pursuance of the powers reserved to her for that purpose in and by the said recited deeds of appointment, she was desirous of making such alteration therein as were thereinafter contained." The deed then proceeded in these words:—"*Now therefore these presents witness*, that in pursuance, exercise and execution of the power or authority, powers or authorities, given, limited or reserved to me in and by the said two several deeds of appointment hereinbefore mentioned, or either of them, *or in or by the several indentures therein respectively recited, and by force and virtue thereof, and of all and every power and powers whatsoever* to me belonging, in me vested, or me thereunto in anywise enabling, I the said *Sarah Carver* do by this present deed," &c. She then revoked so much of the thereinbefore recited "deed" of appointment as directed a sum of 200*l.* charged on the estate to her daughter *Jane Bryat*, and she directed 400*l.* charged on the estate by the first deed of appointment should be paid to *Jane Bryat*. And she revoked so much of the second deed of appointment as directed 200*l.* to be paid by her daughter *Ann Carver* out of the hereditaments limited to her, in satisfaction of a mortgage due to Messrs. *Culverwell*, and which mortgage she directed to be paid by her son *Richard* out of the hereditaments limited to him by the first recited deed of appointment. The deed then proceeded as follows:—"And I do hereby ratify and confirm the several directions, limitations and appointments in the first hereinbefore recited deed of appointment contained, except so much and such part or parts thereof as hath or have been revoked or altered by the secondly hereinbefore recited deed of appointment or by these presents;

presents; and I hereby ratify and confirm the several directions, limitations and appointments in the secondly hereinbefore recited deed of appointment contained, except so much and such part or parts thereof as hath or have been revoked or altered by these presents." This deed also contained a power of revocation and new appointment.

The question which arose, upon a bill for specific performance of an agreement to sell the estate, was, whether the appointment of 1829 was a valid appointment. It was conceded that the deeds of 1813, executed for the purpose of benefiting *Daniel Carver*, who was not an object of the power, were void.

Mr. *Selwyn*, Mr. *W. D. Lewis* and Mr. *Lewin*, for the Defendants, in opposition to the chief clerk's certificate finding a good title. The deeds of 1813 are altogether void, as being a fraud on the power, their object being clearly, on the face of them, to give to the father a life annuity. The deeds of 1820 and 1826 are equally invalid, for they are merely executions of powers attempted to be created by a void instrument, and having for their object to confirm them. This being so, the deed poll of 1829 subsequently executed by Mrs. *Carver* is equally void; for it purports to be an execution of the powers contained in the deeds of 1820 and 1826; it rests on these invalid deeds, and it falls with its foundation. In *Askham* v. *Barker* (*a*), Lord *Langdale* seems to have doubted whether, after a fraudulent execution of a power, the donee of the power could subsequently execute it, even after (with the concurrence of all parties) "setting the matter quite free again altogether level and fair." Here the parties do no such thing, they proceed on the void deed and with the intention, not of previously

(*a*) 12 *Beav. p.* 503.

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previously setting matters right, but of expressly confirming them. In *Farmer* v. *Martin* (*a*), there had been a corrupt and void appointment made of 5,000*l.* by *A.* to *E.* Afterwards *A.*, by a deed to which *E.* was a party, revoked, with her consent, the appointment as to 2,500*l.* and in pursuance of all powers, appointed that sum to an object, and continued *E.'s* title to the remainder. It was held that the appointment of the 5,000*l.* being void, the appointment of the 2,500*l.* must also fail. So in *Jackson* v. *Jackson* (*b*), a father had appointed an estate to his eldest son, on a corrupt bargain which vitiated the appointment, and he afterwards devised the estate to his two surviving sons. A question was raised whether the will operated as an execution of the power, and Sir *E. Sugden* said (*c*), "It is clear, upon the authorities, that if a man exercise a power improperly, so that his execution of it is void, and he subsequently discovers his error, he may then exercise the power in the manner warranted by law. But in the present case, there is this difficulty, that the father never retracted, he never desired to impeach the appointment, nor ever disclaimed it." And he added (*d*), "My strong impression is, that the will, in this case, cannot be considered as a good execution of the power."

Though the words by force "of all and every power and powers whatsoever" are used, they are mere general, formal and sweeping expressions, and it is clear that Mrs. *Carver* had no intention to execute any other powers than those contained in the deeds of 1820 and 1826. She acted on the mistaken assumption that they were valid and she professed to act under, and not in opposition to them. The limitations in default of appointment

(*a*) 2 *Sim.* 502.
(*b*) *Drury*, 91.
(*c*) *Ibid. p.* 120.
(*d*) *Ibid. p.* 121.

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pointment are only to be displaced by a *bonâ fide* execution of the power. Here the donee did not exercise her discretion, she did not act freely, but was subject to a bias and a feeling of honor to give effect to the prior appointment which she had joined her husband in executing, and *non constat* that she would have executed the deed poll at all, or any in its present form, if the prior fraudulent deeds had been withdrawn. The deed is not an independent execution of her first power, but an attempt to prop up a fraudulent invalid appointment.

Mr. *R. Palmer* and Mr. *Cotton* for the Plaintiff. The appointment of 1813, though void in equity, passed the legal estate, and the old power remained in equity. By the death of the father in 1827, the whole vice of the first appointment was eliminated, nothing remained but the estate to the children, and the object of the deed of 1829 was, by every means in the power of Mrs. *Carver*, to give the estate to persons who were legitimately objects of the power, her ratification equitably vests the property in such objects. She professes to act by virtue of every power enabling her, and the deed poll of 1829 recites the deeds of 1820 and 1826, and through them refers to the original power in the deed of 1807.

In *Askham* v. *Barker* (*a*), and *Farmer* v. *Martin* (*b*), the father retained the consideration of the corrupt appointment, and at the date of the second appointment, the first was incapable of being confirmed. Here the contrary is the case, for after the death of the father, there remained no part of the former appointments which was not capable of confirmation.

The

(*a*) 12 *Beav.* 499. (*b*) 2 *Sim.* 502.

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The clear intention was to execute the lady's power in favor of the legitimate objects exclusively.

Mr. *Selwyn* in reply. The husband has had all the benefit intended for him, namely the chance of a life annuity if he survived his wife, and the children have been subject to the burthen. There is no power of revocation in the deed of 1813, and this lady considered she derived her power under the recited deeds; her discretion was never unfettered and the whole intention was to confirm an invalid and fraudulent transaction.

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Dec. 6. It was not, and could not, be contended at the bar that any part of the transaction of 1813 was valid in equity. The appointment in favor of *Richard Carver* was clearly a fraud upon the power, and the whole matter remained, in equity at least, exactly as if these two deeds of 1813 had never been executed.

The deeds of 1820 and 1826 were, in like manner, in equity, a fraud on the power and could not have been sustained, in this Court at least.

The question is, whether the appointment executed by *Sarah Carver*, after the death of her husband, is a valid exercise of the original power of appointment? She took no interest herself under the instrument, and it is a proper and legitimate exercise of the power of appointment originally given, if then subsisting and intended to be executed. There can be no question, but that, if she had recited that doubts had existed as to the validity of the previous appointments of 1813, 1820 and 1826,

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1826, and that in consequence thereof she had executed the deed in question, the appointment would have been perfectly good. Such, however, is not the case, and the deed in question expressly exercises the power of revocation and re-appointment contained in the deeds of 1820 and 1826, and all other powers.

It was argued that the deed of 1829 must fall with the previous appointments, and that although the deed contains general words sufficient to include the power created by the settlement of 1807, still that the whole scope and purport of the deed is based on the validity of the deeds of 1820 and 1826; that it proceeds solely on the authority of them and of the power thereby reserved, and that, accordingly, these instruments are confirmed by this deed. It is argued further, that Mrs. *Carver* was acting solely on the supposition that she had a complete title under deeds which were void, and that she only sought to perform acts under them, and to appoint by virtue of the powers therein contained.

Upon the whole consideration of this case, I think this final appointment is valid, for the reasons I am about to state.

It is important in these cases to consider the manner in which equity gives effect to the intention of the donee of the power to pass the property, even although the power is not properly exercised. It is, as I consider, the rule of this Court, that if the intention to pass the property subject to the power be clearly established, even though the intention to dispose of it under or by virtue of the power is not shewn, still that equity will give effect to the disposition and hold that the property passes under the power. This proposition seems to have been

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been expressly decided in the case of *Wade* v. *Paget* (*a*), although the report of that case seems, in many respects, to be imperfect. If it can be shewn, that the intention of the donee was not to execute the power, then certainly it does not take effect. Lord *St. Leonards*, in considering the cases, states (*b*), I think correctly, "that it is the intention which governs them, and that if the intention be not to execute the power, the power is not executed; but if the intention be to pass the property by all the means in the power of and at the disposal of the donee, then still the property passes and the appointment will take effect, even though the existence of the power under which it operates was not present to the mind of the person who exercised it, that is to say, to the mind of the person who endeavours to pass the property."

I admit that this leads to very nice distinctions, and that it may very often be extremely difficult to distinguish or define the limits between an intention not to execute a power, and the case of no knowledge of the existence of the power; in which case, strictly speaking, there is no intention to execute it, while in the former there is an intention not to execute it. The facts from which such intention and such absence of intention are to be inferred may very often run very near to each other, and possibly lead, in some cases, to very nice and perhaps technical distinctions; but this principle appears to me to be clearly established by the cases.

In this case, I think that the widow intended to give the property according to the limitations contained in the deed of 1820, as altered by the deed of 1826, subject to the alterations which she introduced into them by the deed of 1829. She had, at the time, complete power

(*a*) 1 *Bro. C. C. C.* 364. (*b*) 1 *Sug. Pow. p.* 440 (*6th ed.*)

power to do this, and she uses words which are sufficient to refer to all the powers which she had, and which, inferentially though not in express terms, include the power contained in the settlement of 1807. It is important to remark, in that respect, that she not merely acts in pursuance of the powers "reserved to me in and by the said two several deeds of appointment hereinbefore mentioned [that is, those of 1820 and 1826], or either of them," but also those reserved to her "in or by the several indentures *therein respectively recited*, and by force and virtue thereof, and of all and every other power and powers." That is, by virtue of the powers in the deeds of 1820 and 1826, and of the powers recited in them; and it appears, that the settlement of 1807, containing the original power, is recited in the deed of 1820. I think I must give effect to that intention.

If it could be shewn that she intended to execute no power except that contained in the deed of 1826, I should then hold the opposite, and think, that to give effect to this appointment would be contrary to her intentions; but the mere absence of a recital of the deed of 1807 in this instrument, or the absence of a recital expressive of doubts as to the validity of the deeds of 1826, under which she was acting, do not lead me to that conclusion.

Ascham v. *Barber* (*a*) is, in my opinion, a wholly different case; and Lord *Langdale*, in that case, expressly says, that he expresses no opinion as to what the effect would be if the corrupt bargain, which vitiated the original transaction, had been put an end to, and, to use his own words, if the matter had been set "quite free again, altogether level and fair." Here the corrupt bargain

(*a*) 12 *Beav.* 503.

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bargain had been put an end to by the predecease of the husband.

In *Jackson* v. *Jackson* (*a*), the case, to some extent, involved the same consideration. The original appointment was fraudulent and void, having been made by the father for his own benefit. He obtained the benefit of that fraudulent appointment, he never retracted it, or returned the benefit derived under it, and, consequently, so far from desiring to impeach that original appointment, or having any intention to derive a benefit under a power which was destroyed if that transaction was a valid one, it was obvious that he intended to abide by and support it. Therefore Lord *St. Leonards* decided that "if this will were now to be held to be an execution of the power of the testator, it would be certainly contrary to the intention," that is, contrary to the intention of the father, who was the donee of the power.

Nothing of that sort occurs here; *Sarah Carver* took nothing under any of the appointments, and had no interest in supporting them, and she intended, by all means in her power, to give effect to the deed of 1829.

The case of *Farmer* v. *Mastin* (*b*) is more difficult: it is supposed to decide this, that if the deed of appointment refers, in the recitals, solely to an invalid deed, then, although it contains general words which are sufficient to include all powers, it must be inferred that the appointor did not intend to execute the original power. But I think that such is not the effect of that case, and that the Vice-Chancellor of England relied rather on the other facts connected with it, such as the concurrence of the daughter *Eleanor*, who took 5,000*l.* under

(*a*) *Drury*, 91. (*b*) 2 *Sim.* 502.

under the invalid or fraudulent appointment: he thought that her joining with her father in the deed disposing of the 5,000*l.* shewed that the parties must have considered that the transaction proceeded solely on the footing of *Eleanor* having the right to 2,500*l.*, which was part of the 5,000*l.* appointed to her under the invalid appointment, and a power to dispose of it as she pleased, which was erroneous if the appointment to her was invalid; and the Vice-Chancellor of *England* seems to me to have considered, that as the whole transaction was founded on that supposition, the whole of it must fall with that error. It is clear, however, that Lord *St. Leonards*, in his book on powers (*a*), when commenting on that case, considers that the deed-poll of 1819, executed by the father and his daughter *Eleanor*, might have been supported as an execution of the original power of appointment by the father alone.

In this case, I repeat, that, in my opinion, it was not contrary to the intention of *Sarah Carver* to execute, by the deed-poll of 1829, the power contained in the settlement of 1807; on the contrary, I find an indirect reference to that power, by a reference to the powers contained in the deeds recited in the deed of 1820, and I also find a general reference to all other powers which Mrs. *Carver* had.

I am, therefore, of opinion, that this deed ought to be supported as a valid execution of the power, and that a good title can be made, so far as this point is concerned.

(*a*) 1 *Sugd. Pow.* 443—446 (*6th ed.*)

NOTE.—Affirmed by the Lords Justices, 23rd *March*, 1860.

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HAINES *v.* BURNETT.

Nov. 10, 11.

Under an executory agreement to grant a lease of an hotel, with general and usual covenants, *it was held*, under the circumstances, that the lease ought to contain a power of re-entry on the lessee's becoming bankrupt or taking the benefit of the Insolvent Act.

THE Defendant, Mr. *Burnett*, by a written agreement dated in 1856, agreed to grant the Plaintiff, Mr. *Haines*, a lease of "*The Royal Kentish Hotel, Tunbridge Wells*," for a term of twenty years, at the rent of 280*l.*, and the lessor agreed to expend 250*l.* in permanent substantial repairs, which the agreement specified. It then proceeded in the following terms:—"The lessee to strengthen the centre bow to prevent damage from the weight of the coat of royal arms on the top of such bow to the satisfaction of the surveyor of the lessor. *General covenants.* In consideration of the above outlay by the lessor, the lessee is thereafter to keep and leave the premises in good tenantable repair [specifying the particulars], to keep the beer, spirit and other licences renewed from time to time; for continuing the premises as an hotel and tavern; not to assign, excepting only to a *bonâ fide* responsible person or persons, to be previously submitted to and approved of in writing by the lessor, or assign by way of mortgage, or deposit as a lien for the security of any sum or sums of money lent and advanced thereon to the lessee. The lessor to rebuild or restore premises, if destroyed or damaged by fire, within twelve calendar months, and the *lease to contain, generally, all such other covenants, clauses and stipulations as are usually inserted, both on behalf of lessor and lessee, in leases of property of a similar description.*"

A draft lease was prepared, but the parties disagreed as to its form. The landlord insisted on the insertion of the following proviso for re-entry:—"In case the said Mr. *Haines*, his executors, administrators or assigns,

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assigns, shall be declared a bankrupt or bankrupts, or shall take the benefit of any act of parliament for the relief of insolvent debtors, or shall make any assignment for the benefit of or composition with his or their creditors, or in case of any execution for debt being entered upon the premises hereby demised, then and in any or either of such cases" it should be lawful for the landlord to re-enter &c.

This, the lessee objected to, and he instituted this suit for a specific performance of the contract.

Mr. *R. Palmer* and Mr. *Osborne*, for the Plaintiff.

Mr. *Selwyn* and Mr. *C. Hall*, for the Defendant.

Mr. *R. Palmer* in reply. *Church* v. *Brown* (*a*); *Bennett* v. *Womack* (*b*), were cited.

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Nov. 11.

I have looked over these papers, and, considering that this is an executory instrument, that the matter is set out in a vague way in the instrument itself, speaking of "general covenants," and all other covenants "as are usually inserted in leases of property of this description," and also considering the peculiar nature and tenure of the property, I am of opinion that the lease ought to be determinable on bankruptcy or insolvency, or on making any assignment thereof for the benefit of creditors.

The proviso for re-entry must, however, be qualified by omitting the reference to any execution for debt, and substituting, "or in case the property shall be sold by or under any execution against the said Mr. *Haines*," &c.

(*a*) 15 *Ves.* 258. (*b*) 7 *Barn. & Cr.* 627.

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CROSSMAN *v.* BEVAN.

Nov. 16, 17.

A testator gave a legacy to his daughter *Lucy*, and gave to her and her husband a similar power and control over it as was given by the settlement of her sister. And he directed, that if *Lucy* should die without issue, her legacy should revert to his surviving children. The settlement of the other daughter gave to her and her husband a joint power, and in default of appointment to the surviving husband, a separate power to appoint to their children, and in default of children, a separate power to the daughter to appoint the fund to any one by will. *Held*, that as there was an inconsistency, the will must be read strictly, and that *Lucy* had no power of testamentary appointment, but only a joint power with her husband to appoint to children.

MR. *CROSSMAN* had two daughters, *Elizabeth* and *Lucy*, and two sons, *Francis* and *George*. In 1803, *Elizabeth* married Mr. *Doveton*, and by her marriage settlement dated in *July*, 1803, Mr. *Crossman* settled a sum of 3,000*l.* in trust for Mr. *Doveton* for life, with remainder to *Elizabeth* for life, with remainder upon trust for all or any of the children of the marriage as Mr. and Mrs. *Doveton*, during their joint lives, should appoint, and in default, then upon trust, after the decease of Mrs. *Doveton*, for such of their children as Mr. *Doveton* should appoint, and in default, in trust for the children of the marriage equally. And in case there should be no children or child of the marriage, then upon trust for such person as Mrs. *Doveton*, by her will, should give or bequeath the same, and in default of such gift or bequest, in trust for her next of kin.

In *August*, 1803, Mr. *Crossman* made a codicil to his will, whereby he bequeathed to his daughter *Elizabeth Doveton* 500*l.* sterling, and a sum of 2,833*l.* 6*s.* 8*d.* £3 per Cents. And he bequeathed to his daughter *Lucy* 5,833*l.* 6*s.* 8*d.* £3 per Cents. Reduced, and 500*l.* cash.

He then proceeded in the following terms:—

"Should my daughter *Elizabeth Doveton* have any issue in consequence of her marriage with Mr. *Doveton*, I do hereby empower him to give and bequeath by his will

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will to such issue the several sums above mentioned, in such proportions as he shall deem proper. And I do further direct, that if my daughter *Elizabeth Doveton* should have no children, in consequence of her marriage with Mr. *Doveton*, then the several sums above specified, namely 500*l.* sterling, and 2,833*l.* 6*s.* 8*d.* Stock in £3 per Cent. Reduced funds shall revert, after the decease of Mr. *Doveton* and my daughter *Elizabeth*, to my surviving children, or in case of their decease, to their nearest relations.

"And should my daughter *Lucy* hereafter marry, I do hereby give to her and to the person who may be her husband *a similar power and control* over her marriage portion as is given by the marriage articles to Mr. *Doveton* and my daughter *Elizabeth*. And I do also direct, that if my daughter *Lucy* should marry and die without any lawful issue, the several sums given to her, after my decease, shall, after her demise and that of her husband, *revert to my surviving children, or in case of their death, to their nearest relatives.*"

The testator died in 1803.

In 1808, *Lucy Crossman* married Mr. *Ducarel*, and on the occasion, the 5,833*l.* 6*s.* 8*d.* Stock was settled in trust for Mr. *Ducarel* for life, with remainder to *Lucy Ducarel* for life, with remainder on trusts for their children and issue.

And if there should be no children or child of the said intended marriage or issue of such, or if all should die before becoming entitled to a vested interest, then and in that event, from and after the decease of the survivor of them, Mr. and Mrs. *Ducarel*, the trust moneys were to be held in trust for such person and persons

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persons as Mrs. *Ducarel* by her will should give or bequeath the same; and in default, in trust for such persons as were to be entitled to the same under the directions of Mr. *Crossman* contained in the codicil to his will, according to the true intent and meaning of the same codicil.

Lucy Ducarel died in 1846. She never had issue, and by her will, she appointed all the stock to her husband.

Mr. *Ducarel* died in 1855, and after his death, the trustees transferred the 5,833*l.* 6*s.* 8*d.* Stock to his executors, *Bevan* and *Palmer*.

The Plaintiff (the executrix of *Francis*, one of the sons of Mr. *Crossman*, who had died in 1858) instituted this suit against the executors of Mr. *Ducarel*, and the representatives of the other son, and of *Elizabeth Doveton*, to obtain a retransfer of the fund and a declaration of the rights of the parties thereto.

The Plaintiff submitted, that in the events which had happened, the 5,833*l.* 6*s.* 8*d.* was divisible in three shares between the "surviving children of the testator or their nearest relatives."

Mr. *Lloyd* and Mr. *Pemberton*, for the Plaintiff, argued, that the only power given by the testator to his daughter *Lucy* and her husband was a joint power in favor of their children, and not a several power to her to dispose of the fund by will, in case of her having no issue. That it was impossible to give effect to the gift over "to the testator's surviving children, or in case of their deaths, to their nearest relatives," if Mrs. *Ducarel* were to be permitted to defeat it by an appointment in favor

favor of a stranger, and that therefore the codicil must be read strictly as giving a joint, but not a several "power and control" over the fund.

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Mr. *Selwyn* and Mr. *Nalder*, for the executors of Mr. *Ducarel*, contended, that according to the true construction of the codicil of the testator, Mrs. *Ducarel* was, in the events which had happened, entitled to a testamentary power of appointment over the 5,833*l.* 6*s.* 8*d.* £3 per Cent. Reduced Annuities and 500*l.* respectively, that such power had been duly exercised by her will in favor of her husband, and that under such appointment he became, and that his personal representatives now were, absolutely entitled thereto.

That all the powers, joint or several, contained in the settlement of Mrs. *Doveton* must be imported into the gift of the legacy to Mrs. *Ducarel*, and that the gift over in default of children must be read as subject to all those powers, and as if the words, "and if the power and control aforesaid shall not have been exercised" were inserted before the words, "the several sums, &c. to revert to my surviving children," &c. &c.

Mr. *Teed*, Mr. *Murray* and Mr. *Wintle*, for the other Defendants.

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The view I take of this case is in favor of the Plaintiff, though the will is very obscure.

The doubt I felt in this case was occasioned by the rule of construction, which declares that wills shall be construed liberally, but deeds strictly. If the words: —"And should my daughter *Lucy* hereafter marry, I do

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I do hereby give to her and to the person who may be her husband, a similar power and control over her marriage portion as is given by the marriage articles of Mr. *Doveton* and my daughter *Elizabeth*," were standing alone, it might reasonably be contended, that although the words are not put severally, yet that it was meant to give the same control to *Lucy* and to her husband as was given to Mr. and Mrs. *Doveton*, and to each of them, and that in the same manner as if the words "severally and respectively" had been introduced. If these words were construed strictly, it is a power to both, a power and control over the fund given to her jointly with the person who might become her husband. Then what power and control? Why, a similar power as is given by the marriage articles of Mr. *Doveton* and my daughter *Elizabeth*. I then refer to those articles, and I find that they contain a joint power to be exercised in favor of the children of the marriage, and a power to Mr. *Doveton* if he survived, and then one to Mrs. *Doveton*, in case she had no children: but the joint power is one to appoint to the children only: therefore, construing these words of the will strictly, the effect of them would be to give Mr. and Mrs. *Ducarel* a joint power of appointment in favor of their children, and nothing more.

But then the codicil thus proceeds:—"And I do also direct, that if my daughter *Lucy* shall marry and die without any lawful issue, the several sums given to her after my decease shall, after her decease and that of her husband, revert to my surviving children, or in case of their death to their nearest relatives."

But when you turn to the marriage articles of Mr. and Mrs. *Doveton*, you find, that if you construe the previous words, "power and control" severally and respectively,

spectively, it is in direct contradiction to this passage in the codicil, because by it there is no "power and control" given to the daughter *Lucy* in the event of her having no children, but a direction that the money is then to go to the surviving children of the testator. That is, if the first clause in the will means, that the whole of the powers contained in the marriage articles of Mr. and Mrs. *Doveton* are to be imported into this codicil and read as part of it, then *Lucy* has the power, in the event of her having no children, of disposing of the property to whomsoever she pleases, and if she do not, then it goes to her next of kin; but the codicil says, in the event of her having no children, then it is to go to the testator's surviving children or their nearest relatives. So that it is impossible that the whole of the powers contained in the articles can be introduced; you must either omit one of them or you must strike this passage out of the codicil.

I think the proper mode of construing this will is, that which was contended for by Mr. *Lloyd*, to say that, in this instance, these words must be read in their strict literal and legal sense, which is certainly doing no violence to them, for it is merely reading them as they would be read in a deed. The effect of this is, that there is to be a joint power given to the daughter *Lucy* and her husband similar to the joint power given in the marriage articles of Mr. and Mrs. *Doveton*. Subject to that joint power, then, in case of Mrs. *Ducarel* dying without children, the fund is to go to the surviving children of the testator, and in the event of their being dead to their nearest relatives. This applies both to the 5,833*l.* and the 500*l.*

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PASCOE *v.* SWAN.

Nov. 10.

The Plaintiff's mother and the Defendant were tenants in common in fee. She died in 1851, and her interest descended on the Plaintiff, her heir (then an infant). The Defendant, who had previously occupied the estate, continued in possession and thenceforward excluded the Plaintiff. The Plaintiff attained twenty-one in 1857. *Held*, that the Defendant was accountable to the Plaintiff for the whole period, and ought to be charged with an occupation rent.

A COPYHOLD estate called "*Stumpus*" stood limited upon trust for Mrs. *Swan* for life, with remainder on trust for her children as tenants in common in fee.

Mrs. *Swan* died in 1839, leaving three children, viz. *Joseph Donnithorne Swan*, Mrs. *Pascoe* and *James Swan*. *Joseph Donnithorne Swan* afterwards occupied the farm, and maintained his sister, Mrs. *Pascoe*, until her death in 1851. Her interest in the estate descended on the Plaintiff, her heir, according to the custom of the manor, who was then an infant.

The Plaintiff attained his age of twenty-one years in *April*, 1857. After the decease of the Plaintiff's mother, *Joseph Donnithorne Swan* himself occupied and farmed the estate, but he never paid any rent to the Plaintiff in respect of his one-third part of the estate; he excluded the Plaintiff therefrom, and altogether denied the Plaintiff's right to any interest in it.

The Plaintiff, by this bill, prayed a partition, and that one-third might be allotted to him in severalty, and that the Defendant *Joseph Donnithorne Swan* might be charged with, and decreed to pay, a proper occupation rent for the Plaintiff's one-third of the estate since the death of his mother in 1851.

Mr. *Follett* and Mr. *Southgate*, for the Plaintiff, argued, that at common law, one tenant in common might

might maintain an action against another to recover his share of the rents under the 4 *Anne*, c. 16, s. 27, but if ousted, that he might recover in an action for mesne profits; *Goodtitle* v. *Tombs* (*a*); *Eason* v. *Henderson* (*b*); and that similar rights existed in equity. That here, the Defendant had entered on the estate of an infant, and had made himself accountable as guardian or bailiff. [See *Crowther* v. *Crowther* (*c*), and *Mathew* v. *Brise* (*d*).]

Mr. *Renshaw*, for the Defendant, contended that in this case, there had been no receipt of rent. That the Defendant had not entered on the estate of the infant, but had merely continued the possession which he had at the death of the Plaintiff's mother, and that there had been no ouster, for the possession of one tenant in common was the possession of the other; *Peaceable* v. *Read* (*e*).

The MASTER *of the* ROLLS held, that the Defendant must be considered as having entered upon the estate of the infant, and must account for the rents received by him since the death of Mrs. *Swan*; that in taking the account, the Defendant must be charged with a proper occupation rent for one-third of the estate; but must be allowed for lasting improvements.

(*a*) 3 *Wilson*, 118.
(*b*) 12 *Q. B. Rep.* 986.
(*c*) 23 *Beav.* 305.
(*d*) 14 *Beav.* 341.
(*e*) 1 *East*, 568.

Reg. Lib. 1859, *B.*, *fol.* 513.

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An act of parliament authorized the lessees of mines to make a railroad to a canal, through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railway and paying an annual rent. The mortgagee afterwards entered into possession and received the rent for some time. *Held*, that the mortgagee and all claiming under him were bound by the agreement.

BY an act passed in the 29 *Geo.* 3 (c. lxxiv), authority was given for making a navigable canal, called "*The Cromford Canal*," from *Cromford Bridge* to the *Erewash Canal.*

The 80th section of that act is in the following terms:—

"And be it further enacted, that in case the proprietor or proprietors of any manor or estate containing any mines of coal, ironstone, limestone or other minerals, or the renters, *lessees* or occupiers of the same, shall find it expedient or necessary to make any railways or roads to convey his, her or their coals, ironstone, limestone, marble or other stone or minerals *to* the said intended canal and collateral cut, over the lands or grounds of any person or persons, then and in every such case, *it shall be lawful* for him, her or them to make any such railways or roads, he, she or they first paying or tendering

Where an act of parliament authorizes the construction of a railway over the land of another, upon making compensation, and the railway is made without authority from the owner of the land, but is afterwards used for fifteen years with his knowledge, he will not be permitted to interfere with the possession. All he is entitled to is to have the compensation assessed and paid.

An engine-house was erected on the lands of another for working a railway. The railway was authorized by an act of parliament, but the erection of the engine-house was not. *Held*, that after an acquiescence on the one hand, and an undisturbed enjoyment on the other for several years, the possession would not be disturbed, but that a proper compensation must be assessed and paid.

If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, neither the owner of the land nor any person claiming under him can dispute the right of the builder to use the land.

Persons acquiring interest in lands over which a railway is in operation at a rent are bound to inquire as to the nature of the holding.

ing satisfaction for the damage to be thereby occasioned to such lands or grounds, in manner herein directed with respect to land to be taken for the purposes of this act. And it shall also be lawful for the owner or owners of and person or persons interested in such lands or grounds to treat and agree with such proprietor or proprietors, renters, *lessees* or occupiers, for the damage the owner or owners of such lands or grounds shall or may sustain by making any such railway or road. And in case they cannot agree concerning the amount or value of such damage, or in case the owner or owners of or person or persons interested in such lands or grounds shall refuse or neglect to treat, or, by reason of absence or otherwise, shall be prevented from treating, then the same shall be settled and ascertained by the said commissioners, and be subject to the verdict of a jury, if required, in such and the like manner as the value of the lands to be taken for making the said intended canal and collateral cut is, by this act, directed to be settled and ascertained."

In 1843, Messrs. *Mold*, the lessees under a lease which would expire on the 29th of *December*, 1859, of some collieries and mines in *Morley Park*, were desirous of making a tramroad from their works, so as to communicate to the *Cromford Canal*. Part of the intervening land belonged to Mr. *Woolley*, subject to an existing mortgage thereof for 2,582*l*. In *August*, 1843, Messrs. *Mold* gave notice to Mr. *Woolley* of their desire to make the tramroad, and requiring him to treat and to agree upon the amount of damage.

On the 17th of *November*, 1843, Messrs. *Mold* and Mr. *Woolley* (but without the concurrence of his mortgagee) signed the following agreement on the notice:—

"Memorandum. It is hereby agreed by and between

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the undersigned *Daniel Woolley*, of *Heage*, in the parish of *Duffield*, the owner of the piece of land mentioned and specified in the above notice, for himself, his heirs, executors, administrators and assigns, and the undersigned *John* and *Charles Mold*, for themselves, severally and respectively, and for their several and respective heirs, executors, administrators and assigns, that they the said Messrs. *Mold* shall be at liberty to form the railway tramroad through and over the land of the said *Daniel Woolley*, in manner in the said notice specified, and to use the same for the purpose of their several collieries and ironworks, upon the terms following (that is to say):—1st. That the said Messrs. *Mold* shall pay to the said *Daniel Woolley* the sum of 5*l.* 5*s.* *per annum*, for so much of the land as they shall use and require for the formation of the said railway, according to the terms of the above notice, plan and diagram, and as the same is now marked and set out, or as near thereto as the case will admit. 2nd. That they shall hang good gates at the intersecting of each proprietor's land, in a proper and husbandlike manner, and ever maintain and keep the same in good order and condition. 3rd. That in the event of the said railway being discontinued or abandoned, the said Messrs. *Mold*, their heirs, executors, administrators or assigns, shall restore the line to a state proper for cultivation, and shall give six months' previous notice of their intention so to discontinue or abandon the same."

Soon after, Messrs. *Mold* constructed the tramroad, which they used for their collieries and ironworks.

Woolley got into difficulties about the year 1844, and went abroad, and thereupon Mr. *Saint* (who was entitled to a life interest in the mortgage money) entered into possession of the mortgaged property.

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In 1851, Messrs. *Mold* made a deviation in the line of road, and they converted the tramroad previously worked by horses into a railroad worked by a stationary engine. They also erected an engine-house on the mortgaged premises. They did this with the concurrence of a yearly tenant in possession, but without the knowledge of Mr. *Saint*, and without the consent of any other person. About a year afterwards, Mr. *Saint* first heard of the engine-house having been built, and he required Messrs. *Mold* to pay a rent for it; and after discussion, it was ultimately verbally agreed, that an additional rent of 1*l.* 15*s.* should be paid. Mr. *Saint*, in his evidence, said, "nothing passed between us (himself and Mr. *Mold*) as to the length of time for which he was to have the engine-house, or for which he had the tramroad. I never agreed that the engine-house and tramroad were to stay on the land for ever. I never asked how long it was to stay, nor did any one ask me."

In 1854, *Saint* demised the property to *Attwood*, who assigned his term, *minus* a day, to the Defendant *Wheatcroft*, who had, in 1848, bought up the reversionary interest in the mortgage money.

The rent of 5*l.* 5*s.*, and the additional rent, had been paid by Messrs. *Mold* down to 1854.

Wheatcroft, the Defendant, having thus become lessee of the property under the mortgagee in possession, and interested in remainder in the mortgage money itself, began to question the right of the Messrs. *Mold* to the railway. In *January*, 1858, he required an increased rent of 35*l.*, and threatened to stop the road. He insisted that Messrs. *Mold* had no power to erect the steam

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steam engine on his land, and that the act of parliament did not enable the Plaintiff to take any *limestone* from the canal or pig metal *to* the canal. After a long controversial correspondence, *Wheatcroft* and *Saint*, in *March*, 1858, gave Messrs. *Mold* notice to quit the land, and after the expiration of the notice, *Wheatcroft* broke up the railway and threatened to destroy the engine-house.

The consequences were very serious to Messrs. *Mold;* they stated, in their affidavit, that the railway was, up to the destruction thereof by the Defendant, in daily use by the Plaintiffs, and that they were now suffering and would continue to suffer very great and serious daily loss and inconvenience in their business, by the stoppage thereof, being deprived of a supply of coal, to the extent of about 150 tons per day, which they required for their *Morley Park* and *Marehay Works*, for the purpose of carrying on their business of ironmasters, and being also deprived of selling their surplus coal from the *Morley Park Works*, and being also compelled, by the Defendant's destruction of the railway, to cart limestone from the *Cromford Canal* for a distance of above two miles to the *Morley Park Works*, and that a further consequence of the stopping of the line of railway was, to throw out of employment upwards of one hundred men until the same could be restored.

Messrs. *Mold* filed this bill against Mr. *Wheatcroft* alone, praying that he might be restrained from permitting the railway to remain in a state unfit for ordinary use and traffic, and from preventing the Plaintiffs, their servants and agents, from forthwith replacing the rails removed by the Defendant, and otherwise restoring the railway to a state fit for ordinary use and traffic, and from interfering, in any manner, with the Plaintiffs' use of

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of the railway and tramroad through and over the land in the Defendant's occupation, when the same should have been restored, for the purpose of their several collieries and ironworks. 2nd. That the amount of damages sustained by the Plaintiffs by the commission of the wrongful acts aforesaid might be ascertained and assessed, and be paid by the Defendant to the Plaintiffs.

A motion was made for an injunction, which was turned into a motion for a decree.

Mr. *Selwyn* and Mr. *Rendall* for the Plaintiffs, relied on *Dann* v. *Spurrier* (*a*); *The Duke of Devonshire* v. *Elgin* (*b*); *The Duke of Beaufort* v. *Patrick* (*c*); *The Somerset Canal Company* v. *Harcourt* (*d*), and *Sutherland* v. *Briggs* (*e*).

Mr. *Follett* and Mr. *Rowcliffe* for the Defendant.

The MASTER *of the* ROLLS.

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There are two questions to be considered in this suit; first, whether the Plaintiffs have a right to the use of the railway across the land; and, secondly, what compensation they ought to pay for it, and whether it has already been ascertained and to what if any extent.

With respect to the first question, even upon the Defendant's own case, there can, in my opinion, be no doubt

(*a*) 7 *Ves.* 231.
(*b*) 14 *Beav.* 530.
(*c*) 17 *Beav.* 60.
(*d*) 24 *Beav.* 571; 2 *De G. & Jones*, 596.
(*e*) 1 *Hare*, 26.

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doubt that the Plaintiffs are entitled to the use of the railway.

There is an act of parliament which by the 80th section enacts, that the proprietors or lessee of any estate containing mines may, if they find it expedient or necessary, be at liberty to make a railway over the lands of the adjoining proprietors to join the canal. The Plaintiffs, who were lessees and therefore clearly within this clause, actually made a tramroad in 1843 across this land, which is within the provisions of the act.

If the tramroad had been originally made without the authority of the owner of the land, and the owner having full notice of its existence had allowed the Plaintiff to remain in possession of it without interference for fifteen years, all that he could now do would be, to require compensation for the damage occasioned to the land.

In my opinion, it makes no difference, in this view of the case, that the railroad was substituted for the tramroad, and that the railroad takes a different direction over these lands from that which the tramroad took. Assuming that the original formation of the tramroad was unauthorized, it is sufficient for this purpose to say, that it has been used for a period of fifteen years before any complaint was made by the owner of the land: for this purpose I treat the Defendant as the absolute owner of the land. The Defendant, at the end of fifteen years, says, "If you will not pay me the rent which I demand, I will turn you out of possession, and forcibly tear up the rails." He had no right to take up the rails, all that he had a right to was, to receive such a compensation

compensation for the damage done as he was entitled to under the act, and the cases of *The Somersetshire Canal Company* v. *Harcourt* (*a*), and *The Duke of Beaufort* v. *Patrick* (*b*), clearly lay down that principle. Though, in those cases, the taking of the land originally was unauthorized, yet the Courts held, that the possession must not be disturbed, and all that could be done was to have the proper amount of compensation ascertained and paid.

The Defendant, therefore, in this case, has no justification, even on his own shewing, for taking possession of this land, and the consequence must necessarily be, that whatever be my view and opinion with respect to the rest of the case, there must be an injunction to prevent him from interfering with the Plaintiffs' right of using this railway in the terms which I shall presently state.

The next question raised, is:—What is the duration of this right?

I am of opinion that its duration is clearly pointed out by the act of parliament itself, and that so long as the Plaintiffs are lessees of a mine they will be entitled to this right of way across the land, and that it cannot be stopped. If the Plaintiffs or their assignees continue to be for ever the lessees or occupiers of this land, then the right will continue for ever, and accordingly, the injunction must go in the form of the words of the act of parliament, as long as they continue to remain lessees or occupiers of the land. When their interest in the mines ceases, they will then have nothing to do with the railway, and when other persons become lessees

(*a*) 24 *Beav.* 571; 2 *De G. & Jones*, 596.

(*b*) 17 *Beav.* 60.

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lessees or occupiers of them, new rights may arise as to the right to a railway to the canal; but that question is not now before me.

The next question is, what is to be done with respect to compensation? That divides itself into two heads, namely, the compensation for the railway, and the compensation for the engine-house, and it was very justly observed, that the act of parliament gives no authority to make any engine-house. I find an agreement as to the tramroad entered into in the year 1843 between Messrs. *Mold* and Mr. *Woolley*, who had mortgaged the property, and was the owner of the equity of redemption, and was in possession. The consequence of which is, that it is incumbent upon Mr. *Saint* to shew (which he does not and he took possession in 1844) and for *Wheatcroft* to shew, that this agreement with *Woolley* was one which he was not authorized to enter into. He was the owner and in actual possession of the premises. It is impossible to say, that acting upon a clause like this in an act of parliament, where an arrangement is entered into with the ostensible owner, in possession, and the real owner of the equity of redemption in fee simple, it is not to be binding on the mortgagee, because the mortgagee was no party to it, in a case in which the mortgagee enters shortly afterwards, and receives the very rent reserved by the agreement. I find an agreement in 1843 that five guineas a-year shall be paid for the use of this tramroad, that the tramroad is accordingly made, and that the five guineas are paid from that period down to and including the year 1854.

Then does the circumstance that the tramroad was abandoned, and that a railway was substituted across this property in a more direct line, though I agree that the

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the deviation cannot be called "trifling," make any difference, and does it require a fresh agreement for that purpose? I should infer, from evidence, that the railway was commenced in 1850, a communication then takes place with the tenant in possession, the tramroad is abandoned, and the railway is substituted, and nothing is said as to the agreement of 1843. Is it not obvious that this was a mere substitution of the railway for the tramroad, and that it would bind all parties interested, provided that when they had notice of the facts, they went on receiving the rent and made no complaint of the substitution or change of one for the other? There is, in 1843, a written agreement sufficient to bind the land as regards the tramroad, and afterwards the railroad if substituted for the tramroad, with exactly the same rights attached to it, and this is acquiesced in to the fullest extent. The land on which the old tramroad was placed is taken possession of by the tenant and is taken into cultivation; and judging from the map I should infer, that the change was rather beneficial both to the owner and the occupier, the railway being more direct and occupying less land. Mr. *Saint*, the owner of the land, acquiesces in it, for his tenant takes possession of the tramroad and uses it for the purpose of cultivation, and he himself for several years afterwards down to 1854 receives the rent of five guineas, which is attributable to the railway, and thirty-five shillings which was paid for the engine-house. The Defendant in this case might just as well go and pull down the engine as pull up the rails. It is clear that he at least as mortgagee in possession cannot do it, but I do not say to what extent the owner of the equity of redemption or other persons are bound, that question is not now before me, but at least Mr. *Saint* and all persons claiming under him are bound by the transaction.

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As to the engine-house there was either a licence to erect it or an acquiescence immediately after it was erected, but I am of opinion that the amount of compensation binds no one but Mr. *Saint* himself, and that the amount of compensation for the engine-house is the matter alone to be ascertained. The right to use the engine-house, I am of opinion, binds everybody who has got possession of the land, upon the principle to which Mr. *Follett* referred, recognized in the case of *Dann* v. *Spurrier* (*a*) and many others, and that principle is this:—that if the owner stand by, and allow another to erect a building upon his land, and afterwards agree with him as to the rent to be paid for it, neither he nor any person claiming under him can say, that the owner of the building has not a right to the use of that land. I am of opinion that the right to the engine-house is not imported into the agreement of 1843, and that it is not made binding upon any other person than Mr. *Saint* and those claiming under him, and that therefore, with respect to the engine-house, it will not bind the present Defendant.

It is impossible for the Defendant to say that he knew nothing of this until a subsequent period, that he had no notice of this agreement. Every person who claims under Mr. *Woolley* has notice of this agreement, and more especially when they see persons occupying the railway, and paying rent for it during that time; they are bound to inquire into and to ascertain their title, and they cannot afterwards set up, for their own advantage, and as an excuse for their own act, that they were not aware of what the nature of the title was under which the persons who were using the railway claimed.

Such

(*a*) 7 *Ves.* 231.

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Such being the case, I am of opinion that this is the sort of decree that ought to be made:—In the first place, declare (in the terms of the act of parliament) that the Plaintiffs are entitled to the use of the railway, so long as being proprietors, renters, lessees or occupiers of any mines, &c., they shall find it expedient or necessary to make use of such railway to convey the coal, &c. to the *Cromford Canal*, upon payment of 5*l.* 5*s.* to the owner of the land for the time being; and an account must be directed of what is due from the Plaintiff in respect of that rent.

Then restrain the Defendant, by injunction, from preventing or interfering with the Plaintiffs, their agents or workmen, in replacing the rails and restoring the railway to its former state, and from preventing or interfering with the Plaintiffs, their agents or workmen, from using the railway in such manner as heretofore used, and in any other manner as they may think fit, so as not to injure the land of the Defendant, and so long as the Plaintiffs continue entitled to use the railway.

There must be an inquiry to ascertain what will be a proper compensation to be paid to the Defendant for the use and occupation of the land whereon the engine-house has been erected.

I am also of opinion that the Defendant must make good to the Plaintiffs the damages they must have sustained by reason of the Defendant having pulled up the rails, and impeded and prevented the use of the railway, and that the amount of this must be ascertained.

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The Defendant must pay all the costs of the suit, up to and including the hearing, they having been occasioned by his acts. The subsequent costs will abide further directions.

NOTE.—*Reg. Lib.* 1859, *B.*, *fol.* 326.

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As to the obligation of a father to make good promises made, on the marriage of his daughter, to his intended son-in-law, to leave her a share of his property, and on the faith of which the marriage took place.

A father, prior to the marriage of his daughter, in a correspondence with his intended son-in-law, stated that all his property would be equally divided amongst his children at his decease. A settlement was executed prior to the marriage, which omitted all mention of this. *Held*, that there was an obligation binding on the father; but the first letter having alluded to a prior conversation applying the representation to children who should survive the father, the Court held, that this condition, though not mentioned, affected the whole of the subsequent correspondence, and that the obligation was conditional on her surviving. She predeceased her father, leaving a child. *Held*, that the father was under no obligation to leave any part of his property to the daughter or her issue.

IN 1845, the Plaintiff, Mr. *Loxley*, made proposals of marriage to *Emily*, the daughter of the Rev. *R. Heath*, whose family consisted of two sons and a daughter. Some conversation took place between Mr. *Loxley* and Mr. *Heath* on the subject, the effect of which did not appear, further than as it will be found stated in the following correspondence.

On the 18th of *February*, 1845, the correspondence commenced with a letter from Mr. *Loxley* to Mr. *Heath*, the material parts of which were as follows:—

"I hope you will excuse me referring to our conversation the other day, for, indeed, I should feel more comfortable if the arrangements between us were more perfectly understood." * * * * * "You were pleased to say, that with relation to your property, it would be equally divided among your children who survived you, that *Emily* should have a yearly allowance for pocket money, and that some ready cash to start with should not be wanting. If I have not been misinformed, *Emily* has a few hundreds of her own. I have policies of insurance for 1,000*l.* on my own life." * * * "Will you then oblige me by stating what allowance you will yearly make to *Emily*, and what sum, over and above that which belongs to her, I may receive from you on my

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my marriage, and I shall be happy to settle the same amount for the benefit of those who survive me."

On the 19th of *February*, 1845, Mr. *Heath*, in answer, wrote to the Plaintiff, as follows:—"I have no hesitation in informing you of what Mrs. *Heath* and I are able to promise for our daughter on her marriage and at *our* death. Mrs. *Heath* has 2,400*l.*, and I have rather more in the funds. This sum, with all we possess, *would* be divided at our decease equally among our children. Out of our annual income, we thought of supplying *Emily* with 50*l. per annum;* but as you spoke of the advantage of ready money, we *would* pay on her marriage 500*l.* instead of this allowance, if you prefer this arrangement. The money you refer to as belonging to *Emily* must be, I think, her share in 1,000*l.* left by Dr. *Nott*, first to Mrs. *Heath* and then to be divided among our children. We purpose also giving to *Emily* 100*l.* for her outfit and clothes," &c. &c. He added in a postscript, "I may add, that if either of my sons were in circumstances of abundance as not to need his share of the property, it would then be divided equally between the other two."

In answer, the Plaintiff on the 22nd of *February* said, he preferred the 500*l.* cash to the proposed income.

On the 10th of *March*, 1845, Mr. *Heath*, in a letter to the Plaintiff's mother, said, "when your son asked my consent to his proposals to my daughter, he also asked what assistance I could render them, in the event of their union. I told him what my circumstances were, and offered to allow them 50*l. per annum*, and to leave them a third part of all that we possessed at our decease, explaining what our means consisted of." Mr. *Heath* went

went on to explain, that the Plaintiff had preferred 500*l.* down to the 50*l.* a-year, and said "we have since promised *Emily* 20*l.* *per annum* for pocket-money, and I am very sorry to find that these arrangements of ours have not given you perfect satisfaction, but that you wish us to advance 1,000*l.*, or to engage to pay 25*l.* *per annum* to the young people when married."

The Plaintiff's mother, in reply, said, "I did not, until now, understand, that it is your intention to allow *Emily* 20*l.* *per annum*, as well as the 500*l.* you promised to give on the day of their marriage, or I should not have said what I did on the subject. Depending on your letter that *Emily* will have her equal share at your death, &c., I remain, &c."

On the 11th of *May*, Mr. *Heath*, in a letter to Mr. *Loxley*, said, "I feel much cheered by the intimation you kindly gave me that you had assured 1,000*l.* for the benefit of your survivors, and that you *would secure to her* or them whatever money you may receive from me."

Some little hesitation took place. The Plaintiff prepared and sent to Mr. *Heath* the draft of a settlement, whereby a policy of 500*l.* only on his life was alone settled, and which Mr. *Heath* did not consider "an equivalent for an immediate advance of money;" and in a letter from him to the Plaintiff, dated the 17th of *May*, 1845, he said, "we have provided our daughter with a trousseau of 100*l.*, are ready to advance 500*l.* more, supply her with 20*l.* *per annum* for her pocket, and leave her, at our decease, a due proportion of all we have, and you have expressed your readiness to meet us in the spirit of reciprocity." He referred him to his solicitor, Mr. *Delmar*, who, after some conversation with the Plaintiff, altered the draft settlement by

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limiting the policy money, in default of issue of the marriage, to Miss *Heath*.

The settlement, thus altered, was executed on the 2nd of *June*, 1845; it was made between Mr. *Loxley* of the first part, his intended wife of the second part, Mr. *Heath* of the third part, and two trustees of the fourth part. It recited the policy for 500*l*., and the payment by Mr. *Heath* to Mr. *Loxley* of 500*l*. as a marriage portion with his daughter, and that to make a provision for his intended wife and the issue of the marriage, the Plaintiff had agreed to assign the policy. The Plaintiff then assigned the policy to the trustees, on trust for his intended wife for life, with remainder to the children of the marriage, and he covenanted to keep up the policy. The settlement contained no obligation whatever on the part of Mr. *Heath*.

The marriage was solemnized on the next day, the 3rd of *June*, 1845.

The Plaintiff's wife died on the 26th of *May*, 1846, having by her will appointed all her property to her husband, and appointed him executor. She left issue of the marriage one child only.

Mr. *Heath* died in 1852, having bequeathed all his property to his widow; she died in *September*, 1858, and bequeathed all her property to her two sons (the Defendants) and she appointed them her executors.

This bill was filed on the 2nd of *May*, 1859, by Mr. *Loxley*, stating that the marriage had taken place, in reliance, and upon the faith of the representation and promise in the letters of Mr. *Heath*, that he would, at the decease of the survivor of himself and his wife, leave

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to his daughter one-third share of his estate. The Plaintiff submitted that he was entitled to have that representation and agreement specifically performed and made good, and that he was consequently entitled to one-third of the residuary estate of Mr. *Heath*.

The bill prayed a declaration that the Plaintiff, "as the legal personal representative of his late wife or otherwise," was entitled to one-third of the clear residuary estate of which Mr. *Heath* was possessed or entitled at the time of his death, and for the necessary accounts.

The Defendants insisted that the marriage did not take place on the faith of the arrangements mentioned in the letters, saving only such arrangements as were embodied in the settlement made on the marriage. They submitted to the Court what was the proper construction of the letters, and they also claimed the benefit of the Statute of Frauds, if and so far as the Plaintiff attempted to set up any agreement not made in accordance with the exigency of that statute. They said that the Plaintiff's claim was first preferred on the 22nd of *October*, 1858, and that it was entirely new to, and a complete surprise upon, them. And they claimed the benefit of any defence which might arise from lapse of time, the laches or negligence of the Plaintiff, and the Statute of Limitations.

The Plaintiff verified the statements contained in his bill.

Mr. *R. Palmer*, Mr. *Selwyn* and Mr. *W. D. Lewis*, for the Plaintiff, argued, that the marriage having taken place on the faith of the representations made by Mr. *Heath*, his estate was bound to make it good, in accordance with the decisions in *De Beil* v. *Thompson* (*a*); *Barkworth*

(*a*) 3 *Beav.* 469; 12 *Clark & Fin.* 45.

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Barkworth v. *Young* (*a*); *Johnson* v. *Johnson* (*b*); *Bold* v. *Hutchinson* (*c*). That the Statute of Frauds (29 *Car.* 2, c 3, s. 4) was inapplicable, for the contract appeared in writing, upon the letters of Mr. *Heath* himself. That the Statute of Limitations, if applicable, would only run from the death of the widow, at which time the contract was to be performed.

Mr. *Lloyd* and Mr. *Hobhouse* for the Defendants. The circumstances of the present case fall far short of those in the reported cases. In *De Beil* v. *Thomson* (*d*), the contract was much more precise and formal, and the amount was specified; the settlement was subsequent to the marriage and created a great difficulty, but it was satisfactorily explained. That case has even been considered a "strong case," and as having gone "a long way" (*e*). In *Bold* v. *Hutchinson* (*c*), the amount was recited in settlement, and the cause of the omission, in the subsequent settlement, explained. The case of *Barkworth* v. *Young* (*a*), was decided on demurrer, and upon a bill in which an express contract was alleged.

But here the Plaintiff has failed to establish any such contract as he alleges. First, the correspondence proceeds on a conversation proposing to divide the property amongst the children who survived. In the correspondence everything is spoken of conditionally, the expressions being "would be divided" and "would pay." The father speaks merely of the natural and ordinary course of things, that the daughter's share would probably be increased in the event of the sons not requiring a provision. But it is impossible to say that the father intended

(*a*) 4 *Drew.* 1.
(*b*) 3 *Hare*, 157.
(*c*) 20 *Beav.* 250; 5 *De G., M. & G.* 558.
(*d*) 3 *Beav.* 469; 12 *Cl. & Fin.* 45.
(*e*) 15 *Beav. p.* 349; 1 *Jones & L. p.* 570; *Sug. Law of Prop.* 53.

intended to enter into a positive obligation, so that, at all events, one-third of his property should be payable, even if there should be no issue, or that, in the events which have happened, the Plaintiff, a stranger, should take one-third of Mr. *Heath's* property to the exclusion of his own sons and his grandson.

These letters must be considered as a mere negociation terminating in the antenuptial settlement, and by which written contract alone the parties became bound. After discussion between the Plaintiff and Mr. *Loxley* and his solicitor, the terms were altered, and obligations which, on the correspondence, the Plaintiff, on his part, was bound to perform, are wholly omitted. Thus the policy was reduced from 1,000*l.* to 500*l.*, and the undertaking to settle an equal amount, and to "secure to her or them whatever money he might receive from him" is wholly omitted.

Lastly, this, if anything, is a mere legal contract which ought to be sued on at law; the breach occurred on Mr. *Heath's* death in 1852, upon breach of the alleged contract to "leave" a third of his property to his daughter. The Statute of Limitations, 21 *Jac.* 1, c. 16, s. 3, is therefore a complete answer to the Plaintiff's demand; *Battley* v. *Faulkner* (*a*).

Mr. *Selwyn* in reply.

The case of *Johnson* v. *Johnson* (*b*), and the Statute of Wills (1 *Vict.* c. 26, s. 33), were also referred to as to the point whether, if Mr. *Heath* had left one-third of his property to his daughter, it would have lapsed by her death in his lifetime.

The

(*a*) 3 *Barn. & Ald.* 288. (*b*) 3 *Hare*, 157.

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Had the marriage taken place on the faith of the two letters of the 18th and 19th of *February*, 1845, and if nothing more had occurred, it could scarcely have been disputed, after the decision in *De Beil* v. *Thomson* (*a*), that Mr. *Heath* would have been bound (subject to a question on the construction of his words) to leave one-third of his property to his daughter.

The matter is again repeated in a letter of the 10th of *March*, written by Mr. *Heath* to the Plaintiff's mother, and in her reply. The subsequent letters add but little to what is contained in the previous ones, nor do they detract from them; they are somewhat vague, and repeat generally what had been previously stated.

All these letters are, with some occasional ambiguity, expressive of the intention of Mr. *Heath* to leave to his daughter an equal share of his property on his decease, and as I have already stated, if nothing more had occurred, this Court would have compelled the legal personal representatives of Mr. *Heath* out of his assets to make good the undertaking contained in these letters.

The settlement was prepared and executed on the 2nd of *June* following, and although Mr. *Heath* was a party to it, the settlement contains no mention of this prospective provision nor any covenant on his part on the subject. The indenture recites the payment of the 500*l.* to the Plaintiff, by Mr. *Heath*, as a marriage portion on the marriage of his daughter, and it proceeds to settle the 500*l.* secured by the policy. It is silent both as to the 20*l.* *per annum* to be allowed to Mrs. *Loxley*,

(*a*) 3 *Beav.* 469, *and* 12 *Cl. & Fin.* 45.

Loxley, and also as to the third share which she or her children were to have in her father's property.

It was strongly urged on me, that I ought to consider this indenture as the final settlement between the Defendant and Mr. *Heath*, and that all that had previously taken place must be considered as treaty merely, and which had been abandoned when the final marriage contract was settled. If such had been the case, it would scarcely have been possible but that some trace of an alteration of the intention of the parties to this arrangement must have appeared, either in the correspondence, or in the parol testimony, and I think, upon a careful examination of the whole of the evidence, that the fair result of it is, that the provisions contained in the letters of Mr. *Heath* were never retracted, and that, relying upon them, the Plaintiff contracted the marriage.

It is not necessary, for this purpose, to come to the conclusion, that unless such provision had been made, the marriage would never have been contracted; if they formed a part of the contract, the party to be benefited by it is entitled to have it performed, although it may well be, that rather than forego the intended marriage with the lady in question, he would have consented to other and less advantageous terms, had any such been pressed upon him by her family. It is, therefore, impossible, in such cases, for the Court to enter into any question of the *quantum* of value of this portion of the contract, or its possible influence in inducing the person with whom it is made to contract a marriage, however trifling the estimated amount of such portion may be. Equity cannot divide the contract, and in this Court it must be regarded in exactly the same light as if it had been the point on which the contract turned, and but for

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for this promise the other party to the contract would not have entered into it. Neither can such promise be treated in a Court of Equity as a mere statement of a present intention, the performance of which may be varied as circumstances may alter, and the right of judging and determining which is to be left to the discretion of the person who made it. Not merely the case of *De Beil* v. *Thomson*, but every principle of equity administered in this Court, forbids such a construction being applied to such provisions. If they are intended to be merely voluntary, if the fulfilment of them depends on the mere option of the person who makes them, why are they made at all? They are made and intended to produce an influence on the person for whose benefit they will enure, and cannot be considered as leaving the parties in exactly the same situation as they were before.

In truth the only safe and intelligible rule in such cases is that hitherto adopted in Courts of Equity, to which I have often had occasion to refer; namely, to enforce strict truth in the dealings of one man with another, so that if one man make a deliberate promise to another, with a view to induce that other to do a particular act, and which, relying on such promise, he accordingly does, the promiser shall, in this Court, be compelled to make good his words; and this is much stronger when, as in the present case, he is the person who derives an advantage from the act which he has induced the other to perform. In this case the facts proved satisfy me that Mr. *Heath bonâ fide* made the promise, such as it is, which is to be found in these letters.

That brings me to the consideration of what the promise is, namely, the construction of the words used by Mr. *Heath* in his letters. On this part of the case, I have

I have felt considerable hesitation, and have, after some fluctuation of opinion, come to the conclusion, that the promise meant was to leave one-third part of his fortune to his daughter, only in the event of her surviving the testator.

The contract is shewn by the correspondence, which begins with a letter from the Plaintiff to Mr. *Heath;* this refers to a conversation in which the Plaintiff received a verbal promise from Mr. *Heath* in these words "you were pleased to say, that with relation to your property it would be equally divided among *your children who survived you*" &c. This conversation, and that the proposal was to divide the property among the children who survived him, must be born in mind in considering the subsequent letters. The next letter which is from Mr. *Heath* is consistent with that supposition; he says, this sum, viz., 2,400*l.* "with all we possess, would be divided, at our decease, equally among our children." Nothing is said about the contingency of their not surviving their parent or their father; it assumes they will survive; a postscript is added, stating a contingency on which the daughter's share might be increased, but nothing is suggested as possible to diminish it. The next letter to the mother of the Plaintiff says that he offered "to leave them" (namely his daughter and the Plaintiff) "a third part of all we possessed at our decease." The lady to whom it is addressed says, she depends that *Emily* "will have her equal share at your death." This again is consistent with its being a condition that she should survive her father and is indeed the natural construction of the words. The last letter says: We will "leave her, at our decease, a due proportion of all we have." Here again, it is to her and not to her children or her husband,

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band, and the strict meaning of the words "leave her" assumes that she will survive her parents to enjoy it.

It certainly is not a case free from doubt, and had it not been for the distinct statement of the conversation, which applies simply to children who should survive, I should probably, on the letters of the father alone, have held, that the predecease of the daughter ought not to have varied his obligation; but that conversation, so recorded by the Plaintiff himself, and which I consider the governing clue to the construction of these letters, has brought me to an opposite conclusion.

I am confirmed in it by other circumstances, namely, the total silence as to what was to be done with the third of Mr. *Heath's* fortune when left. It is clear it was not to be settled according to the provisions of the marriage settlement. I find nothing at all in the letters which would have compelled the Plaintiff, if his wife had survived her parents, to settle the third she would then have become entitled to. The only passage relating to this is the following in the letter of the 10th of *May*, in which Mr. *Heath* says to the Plaintiff, "I feel much cheered by the intimation you kindly gave me that you had assured 1,000*l.* for the benefit of your survivors, and that you would secure to her or them whatever money you may receive from me." This might mean "receive from me at any time, either now or hereafter;" but in that case, some agreement to that effect, on the part of the Plaintiff, ought to have been, and probably would have been, introduced into the settlement which was actually executed. The only other passage I find, tending towards a settlement occurs in the letter to the Plaintiff of the 17th of *May*, where, in recapitulating what Mr. and Mrs. *Heath* had done, Mr. *Heath* says, "And you have expressed your readiness to meet

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us in a spirit of reciprocity," and he further says, that he trusts the Plaintiff will carry out this intention, and refers to Mr. *Delmar* as the person best adapted to assist in making these arrangements.

That leads me to inquire, what those arrangements were; they are embodied in the settlement which contains nothing to compel the Plaintiff to settle the third his wife will become entitled to on the death of her father.

It was strongly pressed upon me, that the undertaking was to leave one-third to his daughter, without reference to her being alive or dead and that taking it either way, Mr. *Heath* was bound to fulfil his promise and leave the third to her and that if she predeceased him, then by force of the Statute of Wills, the legacy would enure for the benefit of her child, or at least on the principle of *Johnson* v. *Johnson* (*a*), that it would not lapse. But having regard to the circumstances I have referred to, I think that is not the interpretation I can put on the promise contained in Mr. *Heath's* letter, namely, a promise to leave her one-third of what he possessed whether she were living or dead at the time of his decease. The effect of which would be, that if she were to die without leaving issue, the bequest would lapse and be inoperative, but in the other event, it would be a bequest not to her but to her husband or her children, or rather to her legal personal representatives to be applied as part of her estate. If it had been intended to give the legacy in this manner to the child, in the event of the daughter dying before her father, this would, judging from ordinary intercourse of mankind and from the dealings of the parties, have been so expressed in the letters; but there is nothing in them to shew it. I also think

(*a*) 3 *Hare*, 157.

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think if Mr. *Heath* had intended to promise to leave one-third of all he possessed, whether his daughter survived him or not, that some notice of it would have appeared in the settlement, unless that promise had been intended to be conditional only, and that the condition of survivorship, as originally made in the first conversation on the subject, was considered by Mr. *Heath* to be still in force and to govern the subsequent correspondence, which is quite consistent with this view of the meaning of the father.

It is not to be supposed that I am varying any contract by a conversation. I construe the letters with reference to the conversation stated in them, and treat it as a part of the contract.

I am of opinion that the letters contain a distinct promise binding on Mr. *Heath* to leave a third part of his property to his daughter; but that this promise must be treated as qualified by the previous conversation and held to be conditional only in the event of her surviving him. I think therefore, that as she predeceased her father, the promise does not apply to the altered state of circumstances, and that no obligation now rests on Mr. *Heath's* assets, either towards the Plaintiff or the child of the marriage.

It is therefore unnecessary to advert to the arguments arising from the lapse of time and the circumstance that this claim was not raised until after the death of Mrs. *Heath* and more than six years after the decease of the testator.

The bill must be dismissed with costs.

NOTE.—Affirmed by the full Court of Appeal on the 25th of *February*, 1859, on the ground that the whole contract between the parties had been embodied in the subsequent formal antenuptial settlement.

THOMAS *v.* THOMAS.

Nov. 15, 16.
Dec. 5.

A testator bequeathed, specifically, all the money in the public funds "which he might be possessed of or entitled to at the time of his decease." He subsequently directed his country brokers to invest 5,000*l.* in Consols. They debited his account with the amount, and sent instructions to their broker to make the purchase, but no contract was entered into by the broker until five hours after the testator's death. *Held*, that the additional stock did not pass by the specific bequest, but fell into the residue.

THIS was a special case, and in substance, it submitted the following state of circumstances for the opinion of the Court.

Thomas Thomas, of *Pencerrig*, by his will dated the 20th of *July*, 1857, bequeathed to his executors *all the money and stock in the public stocks or funds of Great Britain which he might be possessed of, or entitled to, at the time of his decease*, upon trust for his grandson *Evan Llewellyn Thomas* (the Plaintiff) if and when he should attain the age of twenty-five years, for his own use and benefit; and in the meantime, during the suspense of the vesting thereof in him, his grandson, upon trust to pay the dividends, interest and income thereof to his, the testator's daughter, *Clara Thomas* for her separate use whilst she should be living, and after her death, to his son-in-law *Henry Thomas*. But if his said grandson should die under the said age of twenty-five years, then he willed and directed, that, from and after such his death, the said money and stock in the public stocks or funds should fall into his residuary personal estate.

The testator died on the 29th day of *December*, 1859.

At the date of his will, the testator was possessed of the sum 20,546*l.* 13*s.* 6*d.* Consols, standing in his own name in the bank books. On the 4th of *August*, 1858, he purchased the sum of 453*l.* 6*s.* 6*d.* Consols, making the

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estate, and his executors are bound to perform the contract and have the stock transferred into the name of the testator, without considering the effect on the devisees or legatees. They cannot repudiate the stock, and let the broker bring an action for damages, the result of which would be to compel payment out of the residue. The Court must consider as done that which the testator authorized and intended to be done for the benefit of the Plaintiff.

Mr. *Lloyd* and Mr. *Baggalay*, for the residuary legatee. It is clear that the testator was not possessed of the stock "at the time of his decease," neither was he "entitled" to it at that period, for no contract had then been entered into. It took place some hours afterwards, and the subsequent unauthorized act of the broker, after the death of the principal, could not affect or alter the rights of the parties as they existed at the moment of the testator's death.

Mr. *R. Palmer* and Mr. *S. Smith*, for the executors.

Harrison v. *Asher*(*a*), and *Vance* v. *Vance*(*b*), were cited.

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Dec. 5. This is a case of great singularity in its circumstances.

The direction given by the testator to purchase this stock was obviously for the purpose of increasing the legacy to the grandson; but the stock was never transferred into the name of the testator, who was dead.

I think

(*a*) 2 *De G. & S.* 436. (*b*) 1 *Beav.* 605.

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I think that it will be contrary to the intention of the testator, to hold that the stock does not form part of the stock of which he was "possessed of or entitled to at the time of his decease;" for that he intended to add this stock to the legacy, I do not doubt, and if he had survived the time when the contract was entered into by the broker, I should have held, that the vendor of the stock was a trustee for the testator, and that the testator was "entitled" to it.

But I do not see any ground on which I can hold, that the testator was, at the time of his death, entitled to stock standing in the name of another person, who had entered into no contract to sell it, and over which the testator, therefore, had no power or control.

The reported cases shed no light on the question of this sort, it is not affected by any of them, and I am of opinion that I cannot give a retroactive operation to the contract entered into about nine o'clock of the morning of the 29th of *December* when the testator had died five hours previously.

I must answer the case, that the stock is not included in the specific bequest. The costs ought to be paid out of the general personal estate.

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PENNELL *v.* THE EARL OF DYSART.

Nov. 11, 15.

When the title of a remainderman is clear, the Court will, at his instance, compel the remainderman to produce the title-deeds; but if his title be not clear, the Court will not, incidentally, decide in favor of the remainderman's title to the estate, in a suit merely for the production of the title-deeds. *Davies* v. *Earl of Dysart* (20 *Beav.* 405) followed.

THE substantial object of the present suit was the same as that in *Davis* v. *The Earl of Dysart* (*a*); viz., to obtain the production of title deeds, but incidentally it sought to obtain a declaration of the rights of the parties to the family estates, and other additional relief.

The principal facts are stated in a former volume (*a*), it will therefore be sufficient to state the circumstances in general terms.

Lord *Huntingtower* was the eldest son of the Defendant the Earl of *Dysart*, he attained twenty-one on the 4th of *July*, 1841, and, on the 18th of *November* following, he mortgaged the family estates, by a general description, to Mr. *Moss Davis*.

On the 2nd of *September*, 1842, Lord *Huntingtower* was adjudicated a bankrupt, and the Plaintiffs *Pennell* and *Selfe* were his assignees.

The present bill set out the documents shewing the title to the estates, and, as the result, it stated as follows:—

"Under the circumstances and by virtue of the instruments and assurances aforesaid, or some of them, Lord *Huntingtower* became and was, at the death of Sir *William Talmash* (1833), seised of or well entitled to

(*a*) 20 *Beav.* 405.

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to the following estates and interests respectively (that is to say), (i.) under or by virtue of the will of the said *Wilbraham* Earl *Dysart*, of or to an estate in tail male in remainder expectant upon the death of the Defendant the Earl of *Dysart* of and in the estates in the counties of *Surrey* and *Suffolk*, of which *Wilbraham* Earl of *Dysart* was seised in fee, or over which he had a disposing power at the time of his death. (ii.) Under or by virtue of the will and the deeds of the 1st and 3rd days of *December*, 1804, and the 7th and 8th days of *August*, 1821, of or to an estate in tail male in remainder expectant upon the death of the Defendant the Earl of *Dysart* of and in two third parts or shares of and in the estates in the county of *Surrey* devised by the will of *Lionel* Earl of *Dysart*. (iii.) Under or by virtue of the will of Sir *William Talmash*, of or to an estate for life, in remainder expectant upon the death of the Defendant the Earl of *Dysart*, of and in the residuary real estates of Sir *William Talmash*, and also of and in the messuage or mansion-house situate in *Hyde Park Place*, which was held by the said testator for a long term of years."

The bill also contained these allegations:—"It is alleged and pretended by the Defendant, the Earl of *Dysart*, that by reason of the noncompliance with the conditions contained in the indenture of the 3rd of *December*, 1804, and the will of *Wilbraham* Earl of *Dysart* respectively, the estates and interests in the said estates, which are thereby respectively limited to Sir *William Talmash* and his issue, became and were forfeited to *John Tollemache* and his issue, and that he, the Defendant Earl of *Dysart*, in the year 1843 purchased the said estates from *John Talmash*, and that thereupon the said estates were conveyed and assured to him the Defendant in fee simple, and that, under the circumstances

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stances aforesaid or in some other manner alleged by the Defendant, Lord *Huntingtower* ceased to have any estate or interest whatsoever in the said estates. Whereas, on the contrary, the Plaintiffs submit and insist, that no such forfeiture, as aforesaid, ever took place, or that if this Court shall be opinion that any such forfeiture did take place, then the Plaintiffs submit and insist, that the sale and conveyance by *John Tollemache* to the Defendant the Earl of *Dysart*, in fee simple, operated as a forfeiture of the estate and interest of *John Tollemache*. And moreover, the Plaintiffs submit and insist, that the alleged purchase by the Defendant the Earl of *Dysart* from *John Tollemache* was invalid or ineffectual, in a Court of Equity, to exclude or defeat the estate, rights or interests of Lord *Huntingtower*, and that the Defendant, the Earl of *Dysart*, is a trustee of the estate so acquired by him for the Plaintiffs, as such assignees as aforesaid, according to their estate and interest in the said estates and hereditaments."

The Defendant the Earl of *Dysart* has now, and for a long time past had, in his possession custody or power, the title deeds, documents and muniments of title relating to the said estates and hereditaments respectively devised and settled as hereinbefore set forth, and he holds "them not only for his own benefit but as a trustee thereof for the Plaintiffs as assignees of Lord *Huntingtower*, yet nevertheless, the Defendant has hitherto refused and still refuses to produce the same to the Plaintiffs, or any person on their behalf, or to allow any inspection thereof."

"The Plaintiffs are ignorant of the necessary particulars and descriptions of such estates and hereditaments, and without a discovery thereof by the Defendant, and a production and inspection of the said title deeds,

deeds, documents and muniments of title, it is impossible for the Plaintiffs to sell and dispose of the estate or interest of the bankrupt, Lord *Huntingtower*, in the said estates and hereditaments, for the purpose of raising the moneys necessary to pay and satisfy the debts of the bankrupt, which still remain unpaid to a large amount, yet nevertheless, the estate and interest of the bankrupt, if sold, would produce sufficient to pay all his creditors, if not in full, at all events a large portion of their respective debts, and there are no other assets of the bankrupt for that purpose. Under the circumstances herein appearing, the creditors of the bankrupt are by the Defendant, the Earl of *Dysart*, wrongfully obstructed in and deprived of their just rights."

The bill prayed (amongst other things) as follows:— "That the Defendant, the Earl of *Dysart*, may be ordered to produce to the Plaintiffs and their solicitors, at such times and places and in such manner as this honorable Court shall think fit to direct, all the title deeds, documents and muniments of title of or relating to the said settled estates and other property which are now in the possession custody or power of the Defendant; and (if necessary), that he may be ordered to discover and set forth a full, true and correct description and particulars of all the said settled estates and hereditaments, and that the title deeds, documents and muniments of title may (if necessary) be ordered to be deposited in this honorable Court or in such other place for safe custody and convenience of inspection as this honorable Court shall think proper."

In addition to this the bill prayed relief in respect of some heir-looms, and also that the boundaries of the settled estates might be ascertained and that the Defendant

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fendant might be restrained from cutting timber, but there was nothing substantial in this part of the case, nor did it affect the decision.

The answer of the Earl of *Dysart* contained the following passages:—

"Shortly after the death of *Louisa* Countess of *Dysart*, and as I believe in the latter part of the year 1840, *John Tollemache*, as the eldest son and heir of *John Richard Delap Tollemache*, claimed as well the remaining two third parts or shares of the hereditaments in the county of *Surrey* which had been devised by the will of *Lionel* Earl of *Dysart* as the entirety of the hereditaments in the said county which had descended to *Wilbraham* Earl of *Dysart* as customary heir of his brother, and of those which had been purchased by *Wilbraham* Earl of *Dysart*, on the ground (as the fact was and is) that neither of the before-mentioned conditions and limitations in the indenture of settlement of the 3rd of *December*, 1804, and the will of the 4th day of the same month had been complied with, so far as the same related to my father and his issue, and consequently that the two third parts or shares in the first-mentioned hereditaments in the county of *Surrey* had become and were vested in him *John Tollemache*, as tenant in tail male, so far as relates to the said two third parts or shares in the first-mentioned hereditaments, and that the entirety in the last-mentioned hereditaments in the county of *Surrey*, respectively, which had so descended upon and had been purchased by *Wilbraham* Earl of *Dysart* as aforesaid, became and was vested in him as tenant for life, with remainder to his eldest son *Wilbraham Frederick Tollemache* in tail male, and thereupon I entered into an agreement with *John Tollemache* for the purchase of all his estate, right and interest, as well as that

that of his issue, in, to, over or in respect of the said several hereditaments at or for the price or sum of 15,000*l.*"

He then set out the conveyances, the disentailing deeds and surrenders, and proceeded as follows:—

"By virtue of the several assurances hereinbefore in that behalf mentioned I have, as tenant in fee simple, ever since the purchase so made by me of the before-mentioned one-third part or share of and in the freehold hereditaments in the county of *Surrey*, devised by the will of *Lionel* Earl of *Dysart*, deceased, been in possession or receipt of the rents and profits of such one-third part or share of and in the said hereditaments, and I have ever since the respective times of the making and executing of the several other assurances hereinbefore in that behalf mentioned, as tenant in fee simple, as well of the remaining two thirds parts or shares in the said last-mentioned hereditaments as of the entirety of the freehold hereditaments which had been so purchased by *Wilbraham* Earl of *Dysart* deceased as aforesaid, and as tenant in fee in equity at the will of the lord according to the custom of the manor or manors of which the same are holden of the copyhold hereditaments which so descended upon *Wilbraham* Earl of *Dysart* as the customary heir of *Lionel* Earl of *Dysart* as aforesaid, been in possession or receipt of the rents and profits thereof respectively; and my son *William Lionel Felix Tollemache* Lord *Huntingtower* had not and has not, nor have the Plaintiffs or any other person or persons claiming under them, as I am advised and insist, any estate, right, title or interest, either in possession, remainder or otherwise in or to the said several before-mentioned hereditaments or any of them. I submit that the Plaintiffs are not entitled to any other discovery or information

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information in respect of the matters in the Plaintiffs' bill mentioned, or any of them, than as herein afforded."

The cause now came on for hearing.

Mr. *R. Palmer*, Mr. *J. H. Palmer* and Mr. *G. S. Law*, for the Plaintiffs.

Mr. *Jessel*, for *Moss Davis*, supported the Plaintiffs' case.

Mr. *Lloyd* and Mr. *Tripp* for the Earl of *Dysart*.

Mr. *Selwyn* and Mr. *Wickens* for the trustees.

The MASTER *of the* ROLLS, without hearing the Defendant's case, said :—

I am of opinion that this is not a case in which I ought to make a decree.

One-half of the objections which existed in the case of *Davis* v. *Earl of Dysart* have, no doubt, been removed, for here all the persons who may be interested in the discussion and consideration of the case have been properly brought before the Court. I adhere to the opinion which I expressed in that case:—that in a clear case between a remainderman and a tenant for life, the remainderman is entitled to have the title deeds produced, for the purpose of enabling him to make the most he can by the sale of his inheritance, or of that which belongs to him; and if this were simply that case, I should act upon that opinion. But I am of opinion that this is not that case, and that there is a great deal more in it. I am convinced, upon reading the bill and considering the arguments of counsel, that practically the intention of the Plaintiffs is this:—to obtain, not in direct words, but inferentially and incidentally, a decision

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sion by the Court, that the Earl of *Dysart* is only entitled to an estate for life in certain hereditaments, and that consequently Lord *Huntingtower* or his assignees are entitled to an estate of inheritance in remainder in them. The object is, to obtain that declaration, and then to go into the market, and say to any purchaser, "here the Court has decided, in fact, after a solemn and deliberate argument by most able counsel, that the Earl of *Dysart* only takes an estate for life. It is true the Court has not made a declaration to that effect in express words, but having laid down distinctly that it could only order the production of the title deeds in a clear case, it has ordered their production in this, and therefore we have got a decision that we have a clear title to the hereditaments subject to an estate for life."

The result might be, I might, after full argument, determine that the Defendant was entitled to an estate for life, with an estate of inheritance in the Plaintiffs, and thereupon order the deeds to be produced. Afterwards, upon the death of the tenant for life, the purchaser or the Plaintiffs, if there had been no sale, would proceed against the persons claiming under the Defendant, either by ejectment or by suit in this Court, to obtain possession of the estate. The question would then be, has this point been decided? The answer would be, certainly not, the Court has made no declaration on the subject. It may have decided it incidentally, but there would be nothing to bind this Court on the second occasion, and the question would have to be argued. But suppose the Court then came to an opposite conclusion, what would the purchaser say? He would justly complain. He would say, "I have been misled by the Court of Chancery into a belief that the Plaintiffs had an estate of inheritance in the property, and I paid my purchase-money on the faith of its order, and now, when

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when the question comes to be tried, I find that the Court was wrong, and that the Plaintiffs had no estate whatever, and I cannot be restored to my original position."

But then comes this other question, which is one of considerable importance:—what is a clear case and what is not? Where an estate is limited to *A.* for life, with remainder to his first and other sons in tail male, I should hold that the tenant for life could not refuse to produce the title deeds to the tenant in tail male, by simply denying that he was tenant in tail. But that is not this case, and where a reasonable argument can be raised on a question which admits of so much doubt, that the Court can only come to a conclusion after a careful and elaborate argument, and after a full consideration of the law and the facts, then I am of opinion that it is not a clear case: otherwise I know not where I am to draw the line, and say which is a clear case and which is not. My impression is, that the *discretion* referred to in my former decision (*a*) meant this:—That where there is a reasonable question to be argued, whatever may be the opinion of the Court upon it, it will not, in the exercise of its discretion, order the tenant for life to produce the title deeds, as it would in a simple case where the estate is limited to *A.* for life, with remainder to *B.* in tail.

This is not a case of that description; it was argued with considerable ability, and many points of interest relating to real property law arose upon it, but it is impossible, after hearing the arguments of counsel, to say that there is not a great deal of nice law involved in it, and which I noticed on the former occasion in the case

(*a*) 20 *Beav.* 419, 423.

case of *Davis* v. *Earl of Dysart*. In truth, the existence of such difficulties is the real cause for the Plaintiffs coming here; because, if the case were really as clear as the case which I have suggested, namely, that of an estate limited to *A.* for life with remainder to *B.* in tail or in fee, the Plaintiffs would not want the aid of this Court, they would simply put up the estate for sale, and the purchaser would not require anything more. But as the Earl of *Dysart* here claims more than an estate for life, and the purchaser may have considerable doubt as to the validity of that claim, the Plaintiffs come here to get from the Court, incidentally and inferentially, a decision or opinion on which the vendor might act, but which might occasion to the purchaser the evils and inconveniences which I have already pointed out.

It is not that the Plaintiffs are in doubt as to the state of the title, because they have got copies of all the deeds; in fact, the whole argument rests upon their contents, and full copies of them have been commented on and handed up to the Court, and have formed the foundation for the whole discussion. So that the case may be stated thus; the title, whatever it be, is well known; if it be perfectly clear, the purchaser will not hesitate to take it, but if it be doubtful, then it is not a case to call upon the Court to decide inferentially that the Defendant is only entitled to an estate for life, by ordering him to produce his title deeds.

I do not repeat over again the observations which I made in the case of *Davis* v. *The Earl of Dysart* (*a*). Some of them in my reported judgment appear to me to apply strictly to the present case, and I abide by those

(*a*) 20 *Beav.* 413.

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those observations; but the latter part of my judgment, which relates to the absence of interested parties, has no application to the present case, which is relieved from that difficulty. I may undoubtedly have formed an erroneous conclusion on this subject, but I find on referring to my notes, that I gave much consideration to the case when it came on before me, and that such was the opinion I formed, and I think that I should be reversing my own judgment, if I were now to decide the other way.

Taking this view of the case, and assuming that the Plaintiffs either have obtained, or that there has been no resistance to their obtaining, the title deeds relating to the estate derived under Sir *Wm. Tollemache's* will, about which there is no question, I am of opinion that the bill must be dismissed.

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SABIN *v.* HEAPE.

Nov. 16, 17.

Under a direction to pay debts, the executors of the original executor sold the testator's real estate twenty-seven years after the testator's death, and nine years after the death of the executor:—*Held*, that a good title could be made under the implied power of sale, and that the vendors were not bound to state whether there existed any debts which made a sale necessary.

Costs of a special case held payable by the Defendant.

THIS was a special case for the opinion of the Court, upon the following state of circumstances:—

Thomas Fereday made his last will, dated the 3rd of *March*, 1832, which commenced as follows:—"First I direct that all my just debts, funeral expenses, and the costs and charges of proving and executing this my will, shall be paid and discharged; *and subject thereto*, I give, devise and bequeath unto my son *Edward Fereday*" all those my freehold lands and hereditaments situate at *Westbromwich*, in the county of *Stafford*, together with all the personal estate, upon trust to pay the rents and profits of one-fifth part of the real and personal estate to my daughter *Ann Sabin*, for her separate use for life, and after her death, to convey it to her two children. And he declared similar trusts as to two other fifths for two other children, &c., and he gave the remaining two-fifths to *Edward Fereday*, his heirs, &c.

The will contained the following proviso:—

Provided also, and I do hereby further declare, that it shall be lawful for *Edward Fereday*, at any time or times hereafter, at his discretion, to make partition, or dispose of, either by way of absolute *sale* or in exchange for other hereditaments, all or any part of the said freehold hereditaments and premises hereinbefore devised, for such price or prices in money, or for such equivalent in hereditaments, as to him shall seem reasonable. And I do hereby declare, that for the purpose of effecting any

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DATES

1832. Death of testator.

1850. Death of executor.
1859. Sale.

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any such partition, sale or exchange, it shall be lawful for *Edward Fereday*, his heirs, executors or administrators, by any deed or deeds, sealed and delivered by them or him, in the presence of and attested by one or more credible witnesses, absolutely to revoke, determine and make void all and every or any of the uses, trusts, powers, provisoes and declarations in this my will expressed and declared of and concerning the hereditaments so proposed to be partitioned, sold or exchanged," and to declare new uses. And he then declared, that the receipts of "*Edward Fereday*, his heirs, executors or administrators," should effectually discharge the person or persons paying the same from being answerable for the misapplication, or bound to see to the application of the money therein mentioned to be received, and that *Edward Fereday*, his heirs, executors or administrators, should lay out the money to arise by such sale, &c. in the purchase of freehold estates of inheritance, and should settle them on like trusts.

The testator empowered *Edward Fereday* to appoint "any person or persons to be a trustee or trustees in his stead or place," and he appointed him sole executor.

The testator *Thomas Fereday* died in *March*, 1832, and *Edward Fereday* proved his will.

Edward Fereday, by his will made in 1848, devised and bequeathed all trust estates vested in him unto the Plaintiffs *Frederick Fereday Sabin* and *William Henry Sabin*, their heirs, &c., upon trust to hold or dispose of them in the manner in which they ought to be held or disposed of pursuant to the said trusts; and he thereby appointed them his executors.

Edward Fereday died in *July*, 1850, and his will was proved by the Plaintiffs.

"Since

"Since the testator's decease, the persons beneficially entitled to the income of the testator's real estate have, by permission of the Plaintiffs, been in the receipt thereof."

By an agreement in writing, dated the 1st of *May*, 1859, and made between the Plaintiffs of the one part, and the Defendant of the other part, the Plaintiffs agreed to sell and the Defendant agreed to purchase the fee-simple of the piece of land situate in the parish of *Westbromwich*, devised by the will of the first testator *Thomas Fereday*, for the sum of 169*l.* 8*s.*

"The Plaintiffs declined to state, in answer to the Defendant's requisitions in this behalf, whether any of the debts of the testator *Thomas Fereday* remained unpaid.

"The Defendant was a willing purchaser, but declined to complete his purchase, alleging that the Plaintiffs had no power to sell the piece of land, either as such trustees or as such legal personal representatives of the testator *Thomas Fereday* as aforesaid."

"The Plaintiffs insisted, that they would make a good title to the land, either as trustees under the express power of sale contained in the will of *Thomas Fereday*, or as executors under the implied power of sale created by the charge of debts contained in his will."

The questions for the opinion of the Court were:—

1st. Whether the Plaintiffs can make a good title to the land as trustees of the said will of the testator *Thomas Fereday*, under the express power of sale therein contained.

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2nd. Whether the Plaintiffs can make a good title to the land, as such executors and legal personal representatives as aforesaid, under the implied power of sale for the payment of debts created by the will of the testator *Thomas Fereday*.

3rd. By whom the costs of the special case ought to be borne.

Mr. *Speed*, for the vendors, argued, on the second question (*a*), that the direction to pay all the testator's just debts, funeral and testamentary expenses, &c. gave to his executor and personal representatives an implied power of sale, especially as the subsequent devise was made expressly "subject thereto."

That where there was a charge of debts, a purchaser was not bound to inquire as to there being a deficiency of the personal estate, or to inquire whether any debts existed which made a sale of the real estate necessary, or to see to the application of the purchase-money; *Elliot* v. *Merryman* (*b*); *Shaw* v. *Borrer* (*c*); *Ball* v. *Harris* (*d*); *Gosling* v. *Carter* (*e*); *Mather* v. *Norton* (*f*); *Robinson* v. *Lowater* (*g*); *Johnson* v. *Kennett* (*h*); *Page* v. *Adam* (*i*); *Eidsforth* v. *Armstead* (*k*).

That the Plaintiffs were not bound to give the Defendant any information as to existence of debts, for Lord *Lyndhurst*, in *Forbes* v. *Peacock* (*l*), held, that a vendor being asked by the purchaser whether the debts

(*a*) The first question was not argued.
(*b*) *Barnardiston*, 78.
(*c*) 1 *Keen*, 559.
(*d*) 4 *Myl. & Cr.* 264.
(*e*) 1 *Coll.* 644.
(*f*) 21 *L. J. Ch.* 15.
(*g*) 17 *Beav.* 592; 5 *De Gex, Mac. & Gor.* 272.
(*h*) 3 *Myl. & K. p.* 631.
(*i*) 4 *Beav.* 269.
(*k*) 2 *Kay & J.* 333.
(*l*) 1 *Phillips*, 717.

debts were not paid, was justified in refusing to answer the question.

That the lapse of time from the testator's death did not affect the power and authority to sell; for in *Forbes* v. *Peacock*, twenty-five years, and in *Wrigley* v. *Sykes* (*a*), thirty-three years, had elapsed from the testator's death.

That debts might still exist, and that after the decision in *Knatchbull* v. *Fearnhead* (*b*), it was difficult to say at what period, however remote, a claim against the estate might not arise.

That the legal estate would be vested in the Defendant by a conveyance from the Plaintiffs, and that the purchaser's title could only be affected by a decree in equity, and that this Court would not interfere against a purchaser in such a case as this.

Mr. *E. F. White*, for the purchaser. I admit the rule, that a direction to pay the testator's debts gives an implied power of sale; but such a power must be exercised within some reasonable limits, the power cannot override the devised estate for ever. In this case, the time which has elapsed since the testator's death (twenty-seven years) imposes both on the vendor and purchaser additional obligations, and the necessity of seeing that there are some reasonable grounds for selling the property at this distance of time. *Edward Fereday*, the trustee and executor, survived the testator eighteen years, and never found it necessary to sell for payment of the debts, and it is not until nine years after his death that his representatives sell the property. Under

(*a*) 21 *Beav.* 337. (*b*) 3 *Myl. & Cr.* 122.

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Under such circumstances, it therefore becomes the duty of the purchaser to inquire whether there are any debts remaining unpaid, and the vendors are bound to give some satisfactory answer to such a requisition.

In *Stroughill* v. *Anstey* (*a*), Lord *St. Leonards*, alluding to this point, says :—" I will only add, in regard to the general question of distance of time, that people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about. I do not thus mean to incumber or to lessen the security of purchasers or mortgagees under trusts; but if, for a great number of years, a trust, such as that here, remains unperformed, and parties are found in possession and receipt of the rents of the trust property, and then an application is made of it without their concurrence by the trustees, it may place those who deal with the trustees in a situation of having it established that there was a breach of trust, of which they ought to have taken notice. So far, however, from wishing it to be supposed that anything which now falls from me is to lessen the security or safety of persons who are purchasers or mortgagees, under ordinary circumstances, I am endeavouring to lay down a rule to make them more secure than perhaps they have hitherto been."

In *Elliot* v. *Merryman* (*b*), the testator's death occurred in 1724, and the sale was in 1727. In *Shaw* v. *Borrer* (*c*), the testator died in 1831 and the sale was in 1832 (*d*). In *Ball* v. *Harris* (*e*), the death was in 1828 and the mortgage for the purposes of the testator's will

(*a*) 1 *De Gex, Mac. & Gor.* p. 654.
(*b*) *Barnardiston*, 78.
(*c*) 1 *Keen*, 559.
(*d*) *See* 5 *L. J.* (*N. S.*) *Ch.* p. 365.
(*e*) 8 *Sim.* 485; 4 *Myl. & Cr.* 264.

will was in 1831. In *Johnson* v. *Kennett* (*a*), the testator died in 1809, and in 1810 and the two following years, the executor sold and conveyed the estate to different purchasers. In *Page* v. *Adam* (*b*), the death was in 1839, and the sale was in the same year. In *Gosling* v. *Carter* (*c*), the death was in 1843, and the sale in 1844, and even in that case the concurrence of the heir at law was necessary. In *Robinson* v. *Lowater* (*d*), the testator died in 1819, and the sale was in 1820. It is true that in *Wrigley* v. *Sykes* (*e*), the sale took place thirty-three years after testator's death; but in that case there was an existing mortgage debt of 3,500*l.*, which rendered a sale necessary; that makes the distinction: shew that there are debts, and this case will be brought within *Ball* v. *Harris* (*f*). None of these authorities go the length of warranting a sale, under the circumstances of this case.

At this distance of time both simple contract and specialty debts would be barred by the statute, and they must be presumed to have been satisfied. At all events this is not such a title as a purchaser is bound to accept.

He also referred to *Storry* v. *Walsh* (*g*); *Doe* d. *Jones* v. *Hughes* (*h*).

The MASTER *of the* ROLLS.

I will not trouble the Plaintiffs to reply in this case, I have taken the pains to look through and consider the authorities which have been cited in this case, and it is due

(*a*) 3 *Myl. & K.* 624; 6 *Sim.* 384.
(*b*) 4 *Beav. p.* 272.
(*c*) 1 *Collyer, p.* 645.
(*d*) 17 *Beav.* 592.
(*e*) 21 *Beav.* 337.
(*f*) 4 *Myl. & Cr.* 264.
(*g*) 18 *Beav.* 559.
(*h*) 6 *Exch. Rep.* 223.

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due to Mr. *White* to say, that I concur in thinking that the point principally urged by him is one of very great importance. In all probability there must be some limit in these cases and some period at which the Court will say, that the debts must have been paid, and when it would be very difficult to make a good title upon a sale made to satisfy a charge of debts on real estate contained in a will. There may be a series of representations from executor to executor during a great number of years and a long enjoyment of the estate by the parties beneficially entitled; and in cases to which these observations apply, it would seem, that the power could not be properly exercised. However, I do not now pretend to fix what ought to be the limit, or where the line is to be drawn; but I am satisfied, that it does not exist in a case like the present, where no more than twenty-seven years have elapsed since the death of the testator.

I have had many cases where executors have fully believed that all the debts had been paid, and where, having taken all the steps possible to ascertain whether there were any debts, they have divided the residue amongst the legatees; yet, notwithstanding all this, debts have afterwards appeared which did not exist at the death of the testator, but which arose subsequently out of obligations entered into by him. These have been so numerous, that I feel sure that a very liberal term ought to be allowed to executors for the exercise of such a power.

The cases have decided that where an executor sells under such a power, he is not bound to answer the question, whether or not there are any debts of the testator existing or not, and although the case of *Forbes* v. *Peacock* may be open to the observations made upon it by Mr. *White*, yet this is clear, that a long period of

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of time had elapsed from the death of the testator before the sale of the estate, and yet there Lord *Lyndhurst* thought, that an answer to the question, whether there were any debts still subsisting, could not be enforced. I am of opinion that this principle applies in the present case, and that it would unsettle titles and the rules of this Court, if I were to decide, that where there is a clear charge of debts, the executor has not power to sell and that the purchaser is not relieved from the obligation to see to the application of the purchase-money. If this were a bill for specific performance, I should make a decree for the Plaintiff, and I must act similarly in a case for my opinion. I am of opinion that the legal personal representatives have authority to sell this property, and I will answer the second question in the affirmative. The Defendant must pay the costs, for if this were a bill for specific performance I should make the costs follow the event, and I must do so here.

TURNER *v.* HAND.

Nov. 18.

A solicitor delivered a general estimate of costs due to him, without specifying the particulars. The client signed a memorandum agreeing to the statement, and requesting *A. B.* (to whom he had given his acceptance), to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery and taxation of the bill of costs, was dismissed with costs.

THE Plaintiff *Marcus William Turner* had, on the introduction of the Defendant Mr. *Hand*, employed Mr. *Story* to act as the solicitor of the Plaintiff and his family.

In *May*, 1855, Mr. *Story* sent to the Plaintiff an estimate of the costs due to him in respect of the business done, and which was as follows:—

"List of actions, chancery and general business conducted for *W. S. Merryweather*, Esq., and family, and

[illegible] made up to 30th [illegible].

	£	s.	d.
[illegible]	6	0	0
[illegible]	25	0	0
[illegible]	12	0	0
[illegible]	5	0	0
[illegible]	9	0	0
[illegible]	36	0	0
[illegible]	5	0	0
[illegible]	40	0	0
[illegible]	5	0	0
[illegible]	10	10	0
[illegible]	50	0	0
[illegible]	12	0	0
[illegible]	21	6	8
[illegible]	71	13	4
[illegible]	19	10	0
[illegible]	150	0	0
[illegible]	10	0	0
	695	0	0
[illegible]	80	0	0
	615	5	8
[illegible]	15	0	0
	£630	5	8

On

On behalf of the Defendant, it was proved that the Plaintiff signed the following memorandum:—

"We agree to this statement as the amount due to Mr. *Story* for his bills of costs and charges, and request Mr. *L. Hand* to pay Mr. *Story* for same on our account. The account to be taken as made up to the 30th day of *May*, 1855, at the sum of 630*l.* Dated the 30th *May*, 1855.

"For self and others, *M. W. Turner*."

The Plaintiff also signed an authority to place a stop order for that amount on the funds in Court in a cause of *Meryweather* v. *Turner*.

Mr. *Hand* paid the amount out of the produce of acceptances, given to him about the same time by the Plaintiff. These bills were negociated; and actions having been brought on them, *Marcus William Turner* instituted this suit, in *July*, 1858, against *Hand*, *Story* and *Harrison* (the Plaintiff in the action), praying, that *Story* might be ordered to deliver his bill of costs in respect of the matters referred to in the estimate, and that the bill of costs, when so delivered, might be referred to be taxed; and for an injunction to stay proceedings at law on the bills or in respect of the costs due for the matters referred to in the "estimate."

The bill alleged one fraudulent item of 30*l.* as for business which had never been done, but this was distinctly disproved, and it also alleged that the estimate contained "flagrant overcharges," but this was not made out.

Mr. *Villiers*, for the Plaintiff, argued that Mr. *Story* was, at all events, bound to deliver a bill of costs, shewing the items of which the general charges were composed. He cited *In re Blackmore* (*a*).

Mr.

(*a*) 13 *Beav.* 154.

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Mr. *Selwyn*, Mr. *Hansard*, Mr. *Simonds* and Mr. *Forster*, for the Defendants, were not called on.

The MASTER *of the* ROLLS.

I must dismiss this bill with costs. The case of *In re Blackmore* (*a*), does not determine the point, and it would be an unfortunate decision, which established that a client could not go to his solicitor and say, "will you take 100*l.* for your expenses in this matter, I do not want a bill of costs, and if you will take the 100*l.* I will give it." Here they agree on the amount, not as in *Re Blackmore*, but there is an actual agreement signed by the client settling the amount of costs according to an estimate on the 30th of *May*, 1855, and on the 31st of *July*, 1858, more than three years afterwards, this bill is filed. What is a solicitor to do in such a case? He receives the money, he is careless of his vouchers, and is it to be permitted that after a lapse of three years he may be required to deliver his bill of costs and submit to have it taxed? I admit it would be better that a client should always have a bill of costs delivered, and, if he object to the amount, that he should take proceedings to tax it. But if a solicitor delivers an estimate, and the client says "I agree to the statement as to the amount due and request *A. B.* to pay it," and signs a memorandum to that effect, he cannot be allowed to come three years afterwards for the delivery and taxation of the bill without any reference to what has taken place.

I must dismiss the bill with costs.

(*a*) 13 *Beav.* 154.

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BUNNY *v.* HOPKINSON.

Nov. 19.

A. sold some building land to *B.*, and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:— *Held*, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon.

THIS was a suit for the administration of the estate of the testator *Jere Bunny*, and the usual decree for taking the accounts had been made in *July*, 1855. Under this, a claim was made by Mr. *Shaw* under the following circumstances:— It appeared that in 1848, the testator became seised of about nine acres of building ground, which now formed the site of *Donnington Square*.

By an indenture dated the 1st of *January*, 1852, the testator, in consideration of 4,300*l.*, conveyed the principal part of that piece of land, which was called *Clay Pit Field*, to *Henry Bunny* in fee, and the testator thereby covenanted, for himself, his heirs, executors and administrators, to and with *Henry Bunny*, his heirs and assigns, that he was lawfully and rightfully seised of or entitled to the said piece or parcel of ground, &c. for an absolute and indefeasible estate of inheritance in fee simple, and that he then had in himself good right and full power to grant, release and assure the same unto *Henry Bunny*, his heirs and assigns, in manner aforesaid.

And that it should be lawful for *Henry Bunny*, his heirs and assigns, from time to time and at all times thereafter, peaceably and quietly to hold and enjoy the same, without let, suit, trouble, denial, eviction, interruption, claim and demand whatsoever from the testator, or any person or persons lawfully or equitably claiming or to claim by, from, under or in trust for him, free from all incumbrances.

Several

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Several houses were afterwards erected on the building land thus purchased.

By an indenture dated the 17th *October*, 1853, *Henry Bunny*, in consideration of 6,000*l.*, conveyed the principal part of the *Clay Pit Field* so purchased by him and the houses built thereon, including Nos. 14, 15, 16 and 17, *Donnington Square*, to *Richard Shaw*. And by the same indenture *Henry Bunny* entered into the usual covenants for title, whereby he covenanted with *Richard Shaw*, that he then had, in himself, good right, full power and absolute authority to grant and convey the same unto *Richard Shaw*, his heirs and assigns, and that it should be lawful for *Richard Shaw*, his heirs and assigns, from time to time and at all times peaceably and quietly to hold and enjoy the same, without let, suit, trouble, denial, eviction, interruption, claim and demand whatsoever from or by him (*Henry Bunny*), or by any person or persons lawfully claiming or to claim by, from, under or in trust for him, free from all incumbrances.

It turned out, that the testator at the date of the conveyance of the 1st of *January*, 1852, to *Henry Bunny*, was not, in fact, seised of the land which he thereby purported to convey, the testator having previously by indenture dated the 1st day of *May*, 1851, conveyed part thereof, forming the sites of the houses Nos. 14, 15, 16 and 17, *Donnington Square*, to one *John Dyne*. These houses and land formed part of the property comprised in the conveyance of 1853 from *Henry Bunny* to *Richard Shaw*.

In *November*, 1853, *Richard Shaw* was evicted from the possession of the houses numbered respectively 14, 15, 16 and 17, *Donnington Square*, and the same had become wholly lost to him. He therefore claimed to be

be a specialty creditor of the testator *Jere Bunny* for the value (3,200*l.*) together with interest thereon from the 22nd day of *November*, 1853, under the covenants for title entered into by the testator with *Henry Bunny* and as *Henry Bunny's* assignee.

The Chief Clerk allowed the claim as a specialty debt, subject to the opinion of the Court as to whether the covenants entitled the claimant to recover only a proportionate part of the original purchase-money of the land, or the full value of the improvement, by the erection of houses thereon, subsequent to the conveyance by the testator to *Henry Bunny*.

Mr. *Bagshawe* and Mr. *Piggott* for the Plaintiff.

Mr. *Beales*, Mr. *Babington* and Mr. *Hetherington*, for parties interested in the testator's estate, insisted that, under the covenants for title, the claimant could only recover the value of the land conveyed by the deed of 1852, and not for additions since made thereto, by erecting buildings and making improvements thereon, which were not comprised in the deed. They argued that if it were otherwise, a covenant for title would engage the covenantor to an unlimited extent, depending not on the value of the property conveyed, but on what the covenantee might subsequently think proper to put on it; *Lewis* v. *Campbell* (*a*).

Mr. *Follett* and Mr. *W. Morris*, for Mr. *Shaw*, were not heard.

The MASTER *of the* ROLLS.

I am of opinion that the measure of the damages upon

(*a*) 8 *Taunt. p.* 727; 3 *J. B. Moore*, 35; 3 *Barn. & Ald.* 392.

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upon these covenants includes the amount expended in converting the land into the purposes for which it was sold.

NOTE.—*See Collen* v. *Wright*, 8 *Ell. & B.* 647; *Waters* v. *Towers*, 8 *Exch. Rep.* 401; *Randall* v. *Raper*, 1 *Ell. B. & E.* 84; *Hadley* v. *Barendale*, 9 *Exch. Rep.* 341; *Dart's Vend.* 417 (*2nd ed.*); 2 *Sugd. Vend.* 539 (*10th ed.*)

COWELL *v.* GATCOMBE.

Nov. 19.

A. B., one of the two trustees and executors of a will and resident in *London*, authorized a person to get in three mortgages (part of the estate). The solicitor forwarded the deeds of reconveyance to *C. D.*, the other trustee, in the country, who executed and returned them. The solicitor received the money and paid it to *A. B.* alone, who misapplied it:—*Held*, that *C. D.* was liable for the amount.

THE testatrix, Mrs. *Gatcombe*, by her will, devised and bequeathed the residue of her real and personal estate to *Richard Gatcombe* and *John Shering Clark*, upon certain trusts for sale and conversion into money, and upon trust to invest the proceeds. They were to hold one moiety in trust for her daughter Mrs. *Stone* for her separate use for life, without power of anticipation, with remainder to her children. The other moiety was to be held on trusts for her daughter Mrs. *Cowell*, her husband and children. The testatrix appointed *Richard Gatcombe* and *John Shering Clark* her executors.

The testatrix died in 1835, and her will was proved by *Richard Gatcombe* and *John Shering Clark*. *Clark* was a stock-broker, resident in *London*, and *Richard Gatcombe* resided at *Plymouth*.

The testatrix's assets consisted partly of three mortgages, viz.:—*Musgrave's* mortgage for 600*l.*, *Bulwer's* mortgage for 1,200*l.* and *Robinson's* mortgage for 532*l.* 13*s.* 6*d.* In 1837, *Clark*, who principally acted, employed a solicitor, Mr. *Stephens*, to get in the three mortgages, which he did.

Mr.

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Mr. *Stephens* said, that he acted as solicitor of both executors, instructed by Mr. *Clark*, that he never saw or received any instructions from *Richard Gatcombe*, but that Mr. *Gatcombe* was aware that he was acting as solicitor for the executors. That he transmitted the deeds of transfer and release to Mr. *Gatcombe* with a letter, and received them back again from him signed, but without any letter. These deeds being executed with proper receipts, Mr. *Stephens* received the amounts due on the three mortgages, and he handed over the money to *Clark* alone.

It appeared that *Clark* misappropriated the money, and a suit having been instituted against him in 1841, he absconded and died insolvent in *America*, and the amount of the three mortgages thereby became wholly lost to the trust.

Richard Gatcombe died in 1855. The question now raised was, whether the estate of *Richard Gatcombe* was liable for the three sums so misapplied by his co-trustee *Clark*.

Mr. *Lloyd* and Mr. *Cole* for the Plaintiffs *Cowell* and wife.

Mr. *Selwyn* and Mr. *Hardy*, for Mr. *Stone*, insisted that the representatives of *Richard Gatcombe* were liable for the amount of the three mortgages. They cited *Styles* v. *Guy* (*a*); *Dix* v. *Burford* (*b*); *Egbert* v. *Butter* (*c*); *Thompson* v. *Finch* (*d*).

Mr. *Follett* and Mr. *Smale*, for the representatives of *Richard Gatcombe*, argued, that under the circumstances of this case, *Clark* alone had become liable.

The

(*a*) 1 *Mac. & Gor.* 422.
(*b*) 19 *Beav.* 409.
(*c*) 21 *Beav.* 560.
(*d*) 22 *Beav. p.* 326.

1859.

COWELL v. GATCOMBE.

The MASTER *of the* ROLLS.

I think, upon the evidence, that Mr. *Gatcombe's* estate is chargeable with the amount of these three mortgage debts, amounting to 2,332*l.* I come to that conclusion by the effect of Mr. *Stephens'* evidence. He being a solicitor, having no interest whatever in the cause, swears positively that he was appointed by one of the executors, and that he acted for both; that he received the amount of these three mortgages, after sending down to Mr. *Gatcombe* the deeds of release or reconveyance, accompanied by a letter (which I infer was explanatory); that Mr. *Gatcombe* signed and returned them to him, and that he received the money as the solicitor of the two executors, and handed it over to one. If Mr. *Stephens* acted improperly in that respect and paid over the money which he received for Mr. *Gatcombe* to another person, he may be liable in an action to his representatives; but Mr. *Gatcombe* himself does not complain of that being an improper payment. It is clear that the acts of Mr. *Gatcombe* enabled a person, who assumed to act as his solicitor as well as the solicitor of Mr. *Clark*, to receive the money, and he paid it over to *Clark*, the other executor.

Mr. *Gatcombe* having done those acts which enabled his co-executor to receive and misapply the money, I am of opinion that his estate must be charged with the amount.

1859.

Re THE OXFORD, WORCESTER AND WOLVERHAMPTON RAILWAY COMPANY.

Ex parte MELWARD.

Nov. 24.

A railway, having severed the arable lands from the farm buildings:—*Held*, that the compensation-money might be applied, under the Lands Clauses Act, in the erection of new farm buildings; but that the company were not bound to pay the costs of obtaining the necessary orders for that purpose.

The words "any of the purposes aforesaid" used in the 80th section of the Lands Clauses Consolidation Act (8 & 9 *Vict.* c. 18) are confined to the purposes mentioned in that clause, and do not extend to those "purposes" mentioned in the previous part of the act.

THE *Oxford, Worcester and Wolverhampton Railway Company*, under the compulsory powers contained in their acts, in which "The Lands Clauses Consolidation Act, 1845 (*a*)," was incorporated, took five acres of a settled estate, called the *Broadmarston* estate, for the purposes of their undertaking.

The railway, in passing through part of it, called the *West* farm, severed the arable land from the farm buildings and homestead, so that it became necessary to cross the railroad in order to house the crops, and thereby great danger and inconvenience was occasioned to the tenant.

The consideration-money payable for the purchase of the land so required by the company was fixed at 600*l.*, and the compensation-money for the damage or injury occasioned by the severance of the lands was fixed at 653*l.* These sums, making together 1,253*l.*, were, in pursuance of the said Lands Clauses Consolidation Act, 1845, paid into Court by the railway company, and invested.

In consequence of the severance caused by the construction of the railway through the "*West* farm," it had become necessary to erect new farm buildings upon it, a plan and specification had been prepared of the necessary works, and a provisional contract had been

(*a*) 8 & 9 *Vict. c.* 18.

1859.

TURNER v. HAND.

Mr. *Selwyn*, Mr. *Hansard*, Mr. *Simonds* and Mr. *Forster*, for the Defendants, were not called on.

The MASTER *of the* ROLLS.

I must dismiss this bill with costs. The case of *In re Blackmore* (*a*), does not determine the point, and it would be an unfortunate decision, which established that a client could not go to his solicitor and say, "will you take 100*l.* for your expenses in this matter, I do not want a bill of costs, and if you will take the 100*l.* I will give it." Here they agree on the amount, not as in *Re Blackmore*, but there is an actual agreement signed by the client settling the amount of costs according to an estimate on the 30th of *May*, 1855, and on the 31st of *July*, 1858, more than three years afterwards, this bill is filed. What is a solicitor to do in such a case? He receives the money, he is careless of his vouchers, and is it to be permitted that after a lapse of three years he may be required to deliver his bill of costs and submit to have it taxed? I admit it would be better that a client should always have a bill of costs delivered, and, if he object to the amount, that he should take proceedings to tax it. But if a solicitor delivers an estimate, and the client says "I agree to the statement as to the amount due and request *A. B.* to pay it," and signs a memorandum to that effect, he cannot be allowed to come three years afterwards for the delivery and taxation of the bill without any reference to what has taken place.

I must dismiss the bill with costs.

(*a*) 13 *Beav.* 154.

1859.

BUNNY *v.* HOPKINSON.

Nov. 19.

A. sold some building land to *B.*, and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:— *Held*, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon.

THIS was a suit for the administration of the estate of the testator *Jere Bunny*, and the usual decree for taking the accounts had been made in *July*, 1855. Under this, a claim was made by Mr. *Shaw* under the following circumstances:— It appeared that in 1848, the testator became seised of about nine acres of building ground, which now formed the site of *Donnington Square*.

By an indenture dated the 1st of *January*, 1852, the testator, in consideration of 4,300*l.*, conveyed the principal part of that piece of land, which was called *Clay Pit Field*, to *Henry Bunny* in fee, and the testator thereby covenanted, for himself, his heirs, executors and administrators, to and with *Henry Bunny*, his heirs and assigns, that he was lawfully and rightfully seised of or entitled to the said piece or parcel of ground, &c. for an absolute and indefeasible estate of inheritance in fee simple, and that he then had in himself good right and full power to grant, release and assure the same unto *Henry Bunny*, his heirs and assigns, in manner aforesaid.

And that it should be lawful for *Henry Bunny*, his heirs and assigns, from time to time and at all times thereafter, peaceably and quietly to hold and enjoy the same, without let, suit, trouble, denial, eviction, interruption, claim and demand whatsoever from the testator, or any person or persons lawfully or equitably claiming or to claim by, from, under or in trust for him, free from all incumbrances.

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or "injured by the proximity of the works;" they are merely rendered less convenient by the severance of the estate, and the costs of "substituting others in their stead" only applies to the prior cases of buildings taken or injured by proximity of the works.

Secondly, as to the costs, the owners of the estate have already received full compensation for all the damages occasioned by the severance, which includes the compensation for removing the farm buildings to another part of the estate. The owners must therefore bear the whole expenses of effecting it.

Thirdly, the Court is not now exercising its ordinary jurisdiction, and it can therefore only give such costs as are authorized by the act conferring the special jurisdiction; *In re Isaac* (*a*). The costs asked do not come within the eightieth section of the Lands Clauses Consolidation Act, and if they do not, the Court has no jurisdiction to order the company to pay them; *Ex parte Taylor* (*b*); *Ex parte Madon* (*c*). It is said that "purposes aforesaid" include all the purposes previously mentioned in the act; but in the case of *Re The Buckinghamshire Railway Company* (*d*), Vice Chancellor *Rolfe* expressly held, that the words "purposes aforesaid," were confined to the "purposes" previously enumerated in the eightieth section, and that they could not be extended.

Mr. *Shapter, amicus Curiæ*, referred to *In re The London and Brighton and South Coast Railway Company* (*e*), in which it was held, that the application of the purchase-money of land taken by a railway company

(*a*) 4 *Myl. & Cr.* 11.
(*b*) 1 *Y. & C.* (*Exch.*) 229.
(*c*) 4 *Railw. Cas.* 49.
(*d*) 14 *Jurist*, 1065.
(*e*) 18 *Beav.* 608.

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pany to the redemption of land tax, was a re-investment within the Lands Clauses Consolidation Act, and that the costs of it were chargeable on the company, under the eightieth section.

The MASTER *of the* ROLLS.

I have no doubt on the merits of this case, and I think that the Court can direct the fund in Court to be applied in the manner proposed. As to the costs, I can only give those authorized by the act, by which my jurisdiction is confined, and the case of the *Buckinghamshire Railway Company* (*a*) seems to decide the point.

Mr. *Nichols* in reply as to the costs.

The MASTER *of the* ROLLS.

I am of opinion that the case of the *Buckinghamshire Railway Company* (*a*) is precisely in point as to the costs, for the Court, having there sanctioned the investment of the compensation-money in something other than land, decided, that the words "purposes aforesaid" were confined to the purposes specified in the eightieth section and did not extend to those mentioned in the previous part of the act.

I will make the order, but the costs of the Petitioners must come out of their own fund.

(*a*) 14 *Jurist*, 1065.

1859.

In re PETTS.

Nov. 24.

A married woman, who had been separated for nineteen years from her husband, married the testator by the description of a widow. She had, about that time, heard a report that her husband was living and had made some loose inquiries, but believed he was dead. The testator having made bequests "to his wife," and the Court being of opinion that the evidence shewed no fraud on her part towards the testator:—*Held*, that she was entitled to the legacies.

JOHN PETTS, late of *Sheffield*, made his will dated the 20th of *April*, 1859, whereby he expressed himself in the following words:—"I give *to my wife* a legacy of 10*l.*, to be paid her within two months of my death. I also give *to my said wife* the use of my furniture for her life."

In a subsequent part of his will, the testator proceeded as follows:—"I direct my said trustees to invest the sum of 500*l.* at interest on mortgage security, and pay the interest or annual income arising therefrom *to my said wife for life, independent of marital control;* and on the death of *my said wife*, I direct my said trustees to sell my said furniture and call in the said sum of 500*l.*, and divide the same in the proportions hereinafter provided for the disposition of the residue of my estate and effects."

The testator died in *August*, 1859; he left him surviving the person who had passed for, and been considered as, his wife. A doubt being raised as to her right to the legacies, the sole acting trustee of the will presented a petition under the 22 & 23 *Vict.* c. 30, for the advice and direction of the Court. The petition stated as follows:—

"That on the 28th day of *May*, 1855, the testator, who was then a widower, went through the ceremony of marriage at *Hansworth*, in *Yorkshire*, with a person who assumed the name and description of *Ann Palmer*, widow, but who was, in reality, at the time of such marriage,

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marriage, the wife of *John Farmer*, she having been married to *John Farmer* by her then name of *Ann Hudson*, widow, in the parish church of *Sheffield* on the 15th day of *February*, 1832, and *John Farmer* being now alive. That the Petitioner had no reason to suppose but that the testator, when he married the wife of the said *John Farmer*, believed her to be a widow. He cohabited with her as his wife up to the time of his decease." The petition prayed for the opinion, advice and direction of the Court how he ought to dispose of the legacies of 10*l.* and 500*l.*, and of the furniture, and particularly, whether the person with whom the testator went through the ceremony of marriage and cohabited up to the time of his decease was entitled to any, and what, interest therein.

It appeared that *Ann Farmer* having married *John Farmer* in 1832, left him in 1836, in consequence, as she alleged, of his cruelty towards her, and that they had ever since lived separate. She said that in 1855 she heard a report that *John Farmer* was living, that she had made inquiries, and had learnt nothing of him, and believed that he was dead.

Mr. *T. Terrell*, in support of the petition, stated the case.

Mr. *Marten* for *Ann Farmer*.

The MASTER *of the* ROLLS called on the residuary legatees.

Mr. *Martindale* for the residuary legatees. Mrs. *Farmer* is not entitled to these legacies. The bequest is not made to any one by name, but to the person filling the character of the testator's wife, which it is clear

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In re Petts.

clear that the claimant does not. Even if she were the person intended by the testator, still the bequest was made to her in consequence of the testator's belief that she was his wife. She married him in the assumed character of a widow, and thereby practised on him such a fraud as invalidated the gift. The case is governed by *Kennell* v. *Abbott* (*a*), there the testatrix, who had married *Edward Lovell*, a married man, by her will, bequeathed a legacy "to my husband the said *Edward Lovell*," and it was held that he was not entitled to it, for that, whenever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he could not demand her legacy. Mrs. *Farmer* is, at all events, bound to prove that she communicated the facts to the testator, and the evidence shews that her inquiries were not *bonâ fide*.

Pratt v. *Mathew* (*b*), does not apply, for in that case both parties were aware of the invalidity of the marriage, and therefore no fraud or deception could have been practised.

The Master *of the* Rolls.

I am of opinion that the evidence before me does not shew anything which amounts to fraud on the part of the legatee. The inquiries may have been loose and not very carefully prosecuted either by the testator or the claimant. She says she did hear a report that *Farmer* was living, but that she did not believe it. She had left her husband nineteen years, he made no attempt to recover her, and having heard nothing of him, she married

(*a*) 4 *Ves.* 802. (*b*) 22 *Beav.* 328.

married again. After that lapse of time, I do not think that the going through the ceremony of marriage with another person can of itself be considered as so fraudulent an act, as to deprive her of this legacy.

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I think that the testator intended to benefit this person, whom he designated as, and thought to be, his wife, and I do not think she has done any act to forfeit it.

I will express my opinion, that on the evidence before me she is entitled, for her separate use, to the legacies.

The costs of the various parties ought to be paid out of the estate, and not out of the legacies.

Re MILES' WILL.

Nov. 26.

Trustees of the will of a testator, who died in 1845, had power to invest on "real securities in *England* or *Wales*, but not in *Ireland*." The Court declined advising the trustee to invest, under the powers contained in the 22 & 23 *Vict.* c. 35, s. 32, on a mortgage of Scotch estate.

The 22 & 23 *Vict.* c. 35, s. 32, is not retrospective.

THIS was a petition presented by the trustees of Mr. *Miles'* will, praying, under the 22 & 23 *Vict.* c. 35, s. 30, for the opinion, advice and direction of the Court under the following circumstances:—

The testator *Philip John Miles*, by his will dated in 1842, bequeathed 20,000*l.* £3 per Cent. Consols and 20,000*l.* £3 per Cent. Reduced to the three Petitioners upon trust, either to permit the same, when invested in their names, "to continue so invested, or from time to time, with the written consent of the person or persons for the time being entitled to the annual produce thereof, if of full age, and if under the age, then, at the discretion of the said trustees or trustee for the time being, to sell the same Bank Annuities, and invest the moneys produced thereby in any other of the parliamentary *stocks or public funds of Great Britain, or at interest upon*

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MILES' WILL.

upon government or real securities in England or Wales, but not in Ireland, and from time to time, with the like consent or at the like discretion (as the case might be), to vary the moneys so to be invested for any other of the said stocks, funds or securities." The trustees were directed to pay the income to his daughter *Clara Philippa Miles* for her separate use during her life, without power of anticipation, and after her decease, to her husband during his life, with remainder to her children.

The testator afterwards bequeathed two similar sums of stock to the trustees upon the same trusts, &c., for his daughter *Ellen Octavia*.

The testator died in 1845. His daughter *Ellen Octavia* married Captain *James Townsend Oswald*, and they had six children, who were infants.

The 32nd section of the 22 & 23 *Vict.* c. 35, enacts as follows:—

"When a trustee, executor or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of *England* or *Ireland*, or on *East India* Stock, it shall be lawful for such trustee, executor or administrator to invest such trust fund on such securities or stock, and he shall not be liable, on that account, as for a breach of trust, provided that such investment shall in other respects be reasonable and proper."

But the 33rd section provides, that this act shall not extend to *Scotland*.

Captain *Oswald* was the owner of considerable real estate

estate in *Scotland*, and he had lately, with the full consent and approbation of his wife, applied to the trustees to advance him, by means of a sale of a competent part of the trust-moneys of 20,000*l.* Consols and 20,000*l.* Reduced, the sum of 10,000*l.* sterling upon a mortgage of real estates in *Scotland* of abundant value, and the trustees were ready and willing to make such advance, upon having the written consent of Mrs. *Oswald*, which she was willing to give, should this honorable Court be of opinion that the trustees could safely and properly do so under the provisions of the above-mentioned act.

The petition prayed the opinion, advice and direction of the Court, and that it would be pleased to say, whether, in its judgment, it would be fit and proper and in accordance with the duty of the Petitioners, as trustees, that they should, with the consent in writing of Mrs. *Oswald*, advance thereout to Captain *Oswald* the sum of 10,000*l.* sterling upon the security of his real estate in *Scotland*.

Mr. *Osborne*, in support of the petition, argued that the act distinctly applied to the present case, and that as this application was assented to by Mrs. *Oswald*, the trustees only required the sanction of the Court for their indemnity.

Mr. *Briggs* for Captain *Oswald*.

Mr. *Chapman Barber*, for Mrs. *Oswald* and her children, stated, that he was instructed to support the petition.

The MASTER *of the* ROLLS.

If I were a trustee, I certainly should not do it, and I could

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Re MILES' WILL.

I could not advise the trustees to do it. Without knowing much more than I do of the law of *Scotland* on the subject, I should be apprehensive that the trust estate might be liable to the debts of the trustees, and that the descent of the trust property might be altered by converting it into an heritable security. If the act empowers the trustees to do what is asked, I might advise them that they have power to do it, and that they would not commit a breach of trust by so doing; but I am not inclined to go further or to advise the trustees to take the trust funds out of the jurisdiction of this Court. I must require the case to be argued by Mr. *Chapman Barber* on behalf of the infants.

Mr. *Chapman Barber* then argued, that the act did not apply, first, because it was not retrospective, but referred only to trusts created after the passing of the act. That it was impossible to conceive that the legislature could have intended to vary the trusts of all existing settlements, and it clearly contemplated those cases where trustees might "be expressly forbidden" to make any such investment, and intended to give settlors the power of so doing, which could only be in cases subsequent to the act. Secondly, that the act applied only to cases where trustees were empowered, of their own authority, to make a change in the investment of the trust property, and not to cases where, as in the present instance, it could only be done "with the written consent" of the tenant for life.

Mr. *Osborne* in reply.

The MASTER *of the* ROLLS.

I think the act can only be prospective, and that it could not have been the intention of the legislature to alter all existing settlements without expressly stating so.

I think

I think that the words, "when a trustee shall not by some instrument creating the trust be expressly forbidden," must mean by some instrument executed after the passing of the act.

NOTE.—By the 23 & 24 *Vict.* c. 38, s. 12, the 32nd section of the 22 & 23 *Vict.* c. 35, is now made to operate retrospectively.

Re PEDROTTI'S WILL.

Nov. 26.

A testator bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal." He gave the residue to his brothers. The residue only produced 30*l.* a-year, and the widow claimed the whole capital. *Held*, that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life.

THE testator *John Pedrotti*, by his will, dated in 1853, gave as follows:—

I give, devise and bequeath to my beloved wife *Ann Pedrotti*, provided she doth not marry, the sum of 200*l.* to her own disposal, and the interest of the remainder of my personal estate during the time of her natural life. And I further devise, in case anything should occur *that her income is not sufficient*, she shall be at liberty to go to the principal; and after her funeral expenses be paid, I devise and give to *John Chetticks* and *Isabella Oliver*, my natural children, 19*l.* 19*s.* each. I give and devise the remainder of my personal estate to be equally divided between my brothers and sisters now living in *Italy*. He appointed three persons to be his executors and trustees.

The testator died in *September*, 1855, and the clear residue of his estate consisted of 975*l.* 17*s.* 3*d.*, which had been invested in 1,049*l.* Consols.

On the 7th *March*, 1856, the executors received from the widow a notice signed by her, stating that inasmuch as her income was not sufficient for her, she thereby, under the power given to her by the will, required them to pay her forthwith the capital of the residue of the personal estate. The fund was paid into Court, and in *April*, 1856, the testator's widow presented her petition, stating

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Re PEDROTTI'S WILL.

stating that her only income consisted of the dividends of the testator's residuary personal estate, which did not exceed 30*l.* per annum, and that it was not sufficient for her proper maintenance and support. She claimed the whole fund, and prayed that it might be paid to her.

The petition was heard on the 5th of *July*, 1856, and it appearing that the residuary legatees had not been served, the Court ordered the payment of costs and the interest of the residue to be paid to the widow during her life, and that the further consideration of the petition should be adjourned.

The widow died on the 27th of *December*, 1857, without bringing on the petition for further consideration; but it was now brought on by her administrator, at the same time as a petition by the residuary legatees for payment to them of the fund.

Mr. *R. Palmer* and Mr. *Rendall*, for the administrators of the widow, claimed the whole fund. They cited *Methold* v. *Turner* (*a*); *Rudland* v. *Crozier* (*b*); *Cowman* v. *Harrison* (*c*).

Mr. *T. O. Haynes*, for the residuary legatees, argued that the widow had no right to resort to the capital beyond what was necessary to secure her a reasonable income for her maintenance.

The MASTER *of the* ROLLS held that the widow was not entitled to the whole fund, but only to so much as, with the interest, would be sufficient to afford her a maintenance suitable to her station in life, and that this appeared to be about 60*l.* a year clear of everything.

(*a*) 4 *De G. & Sm.* 249.
(*b*) 2 *De G. & Jones*, 143.
(*c*) 10 *Hare*, 234.

NOTE.—An order was made for payment to the administrator of 93*l.* for arrears of the 60*l.* a-year; 19*l.* for the widow's funeral expenses, and 10*l.* for the expense of obtaining letters of administration. *Reg. Lib.* 1859, *B.*, *fol.* 449.

1859.

BRISTOW *v.* SKIRROW. (No. 1.)

Dec. 2.

A testator devised an estate upon the same trusts, &c. as his wife, by her will, should declare "with respect to the disposition of her residuary personal estate." The widow bequeathed the estate to *A.*, and her residue to *B.*, *C.* and *D.* *Held*, that the widow had an absolute, and not a restricted power, and that the estate did not pass with the widow's residue, but belonged to *A.*

SOME hereditaments at *Soond*, held for a term of ninety-nine years if Lady *Chetwode*, *William Walker* the younger and *Thomas Goodall*, or either of them, should so long live, were settled by an indenture dated the 10th of *October*, 1837, in trust for Sir *John Chetwode* for life, and afterwards for Lady *Chetwode* for life, and after the decease of the survivor, in trust for such persons as Sir *John Chetwode* should by deed or will appoint.

In 1843, Sir *John Chetwode*, by his will, appointed these leaseholds "to the same uses, upon the same trusts and to and for the same intents and purposes, as his wife might have declared or should thereafter declare *with respect to the disposition of her residuary personal estate* by her last will," and "in default of any disposition by his said wife of her residuary personal estate, or so far as the same (if any) shall not extend, then upon trust to dispose of the said leasehold premises and other trust property as he (the testator) should, by codicil appoint, and in default for his next of kin.

He died without making any further disposition thereof, leaving Lady *Chetwode* surviving.

Lady *Chetwode* (afterwards Mrs. *Hutchison*), by her will, dated in 1858, after reciting that by virtue of a certain deed she had a power of appointment over a dwelling-house in *Montague Square*, and that she was desirous

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desirous of executing it, bequeathed it unto *Skirrow* and *Robson*, upon certain trusts. And she bequeathed unto *Skirrow* and *Robson* all her property and estate known as *Soond Hill*, in *Cheshire*, upon trust to pay the net rents and profits arising from the same to the Defendant *Charlotte Tiley*, for her life for her separate use. And she directed her executors and trustees to invest in their names 2,000*l.*, upon trust for *Charlotte Tiley* absolutely, provided she should survive *William Walker* (the last life mentioned in the lease of the said *Soond Hill* estate), as upon such event happening, all the interest of *Charlotte Tiley* in the rents and profits of the *Soond Hill* estate would cease and be at an end, which sum of 2,000*l.* the testatrix gave to *Charlotte Tiley* (subject to the last-mentioned proviso) as a recompence for the loss of such rents and profits. The testatrix then gave and bequeathed all her real and personal estate to her trustees, upon trust to convert into money and pay her debts and legacies. And as to all the residue of the property of which she should die possessed, either in reversion, remainder or expectancy, not thereinbefore disposed of, the testatrix gave and bequeathed the same as follows:—one-third part thereof to "*St. George's Hospital*," one other third part thereof to "*Queen Charlotte's Lying-inn Hospital*," and the remaining third part thereof unto the "*Houseless Poor Society*," 75, *Old Broad Street, City*.

The testatrix died in *July*, 1858.

St. George's Hospital was incorporated by act of parliament, and under the act of incorporation it was entitled to acquire, hold and retain, for the purposes of the institution, lands and hereditaments of any tenure, notwithstanding the Statute of Mortmain.

The

The cause now came on for further consideration.

Mr. *Rowcliffe* for the heir and next of kin of the testatrix.

Mr. *Lloyd* and Mr. *C. Hale* for the executors.

Mr. *Follett* and Mr. *Rocke* for Mrs. *Tiley*, argued, that the *Soond* estate passed under the will of Lady *Chetwode*, for that the power given to her by Sir *John Chetwode's* will was a general absolute power to dispose of this property as part of her general estate. That in strictness the effect of her will was to appoint a part of her residuary estate to Mrs. *Tiley*, with a gift to the charities of the rest.

Secondly. That she was entitled to the 2,000*l.* both in case she did not take or if she lost the *Soond* estate, the object being to recompense her, whenever her interest in the estate ceased. They referred to *Abbott* v. *Middleton* (*a*).

Thirdly. That the Plaintiff must be put to her election.

Mr. *Bagshawe* and Mr. *Hawkins*, for *St. George's Hospital*, argued that the power contained in Sir *John Chetwode's* will was a limited one, giving Lady *Chetwode* a mere power to appoint to such persons as should take her residue, that the residuary legatees when appointed under the will of Lady *Chetwode* became the persons designated by the will of her husband, and that they alone could take the *Soond* estate. That Lady *Chetwode*, having made a residuary gift of her own property, the consequence followed, that the *Soond* estate passed

(*a*) 21 *Beav.* 143 *and* 7 *House of Lords Cas.* 68.

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passed under the will of Sir *John*. That the attempt to devise it specifically was not warranted by the power, and that therefore the appointment was invalid and might be considered as erased from the will.

Secondly. That the 2,000*l.* was only given to Mrs. *Tiley* provided she survived *Walker*, and in no other event, and that the reason expressed for making the bequest of 2,000*l.* did not enlarge the terms of the gift or remove the qualification in the proviso.

Mr. *Shapter* for *Queen Charlotte's Lying-in Hospital.*

Mr. *Bazalgette* and Mr. *North* for the next of kin of Sir *John Chetwode.*

Mr. *Walford* for the trustees of Sir *John Chetwode's* will.

Mr. *Selwyn* and Mr. *J. W. Bovill* for the *Houseless Poor Society.*

The MASTER *of the* ROLLS.

I am of opinion that a general power of appointment was given by Sir *John Chetwode* to Lady *Chetwode*, that she had the power of disposing of this property by her will, and that she has exercised that power. It is to be observed, that, under Sir *John Chetwode's* will, there are two ways only in which it could be contended that *Charlotte Tiley* did not take, viz., that the will specifically pointed out either a particular person to take, or a class with a power to Lady *Chetwode* of selecting which of the members of that class should take. For instance, he might have said, "On the death of my wife, I give it to the particular persons who shall be named residuary legatees in her will," or he might have

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have said, "I give it to such of the residuary legatees named in Lady *Chetwode's* will as she shall select and appoint." But he has done neither of these. He has neither mentioned any person nor designated any class of persons; he has, in effect, done nothing more than say, that "It shall be held upon the same trusts and for the same purposes as his wife shall declare with respect to the disposition of her residuary personal estate." That is, he directs that it shall form part of his wife's residuary personal estate. Would it not have been liable to her creditors in case there had been a deficiency of assets to pay them? In my opinion the object and purport of the will is, to make it pass as part of the residuary personal estate of his widow, and being so, I think it passes by her will under a specific bequest of it. The Court will not adopt the singular technicality of determining, that the testatrix, having a full and complete power under the will of Sir *John Chetwode* to dispose of this property in favor of *Charlotte Tiley*, has not done so, solely because she has given it in the form of a distinct and particular bequest, instead of treating it as part of her residuary estate. If she had said, "the residuary estate is to be divided into thirds, save and except the *Soond Hill* estate, which I desire may be enjoyed by *Charlotte Tiley*, there could have been no question that she would have taken it, unless it could be held (which would be much too strained an interpretation), that every one of the trusts of the residue must apply to the property which passes under this particular power.

My opinion is, that the true construction of the will of Sir *John Chetwode* is to make this property part of the personal estate of his widow, and thus to give her an absolute power of disposing of it by will, and that having exercised that power, *Charlotte Tiley* takes it.

BRISTOW *v.* SKIRROW. (No. 2.)

Dec. 2.

A testatrix devised her real and personal estate to trustees, and directed her advowson of *F.* to be sold by them immediately after the death of *H.*, the incumbent. *Held*, that although, on *H.*'s death, the living must be filled before there could be a sale, still that the Court had no authority to direct the sale of the next presentation in the lifetime of *H.*, for the benefit of the residuary legatees.

THE testatrix devised her real and personal estate to trustees, and directed that the advowson of *Feckenham*, in the county of *Worcester*, (which was her sole property), should be sold by her trustees and executors immediately after the death of the Rev. *Zebulon Wright Hinton*. And she declared that they were, on no account, to sell the same to any member of, or to any person in connection with or interested for the family of the said *Zebulon Wright Hinton*, and that the proceeds of such sale should sink into and form part of her residuary estate. The testatrix gave her residuary estate to three charities, one of which was capable of taking real estate.

The testatrix died in 1858.

The Rev. *Zebulon Wright Hinton* was the rector of *Feckenham*, he survived the testatrix and was still living.

By the decree made on the 11th *March*, 1859, it was declared, that the advowson of *Feckenham* ought not to be sold until the death of Mr. *Hinton*, the incumbent.

The cause now came on for further consideration.

Mr. *Bagshawe*, for one of the resid ary legatees, now insisted that the next presentation ought to be sold for the benefit of the residuary legatees, who were entitled to it as part of the estate of the testatrix not specifically disposed

disposed of. He argued that the effect of postponing the sale of the advowson until the death of the present incumbent would be this:—that a clerk must first be presented to succeed him before a sale could take place, for by law, an advowson, if vacant, cannot be sold, as it would be simony. He also argued that the decree postponing the sale of the advowson did not affect the question now raised as to the sale of the next presentation.

Mr. *Selwyn* and Mr. *Bovill* supported the same view. They argued that, upon the death of Mr. *Hinton*, a new life must be put in, and that this right of next presentation was undisposed of, and belonged to and ought to be exercised for the benefit of the residuary legatees. That there were no negative words in the will prohibiting the sale.

Mr. *Rowcliffe* and Mr. *Lloyd*, for the Plaintiff and the trustees, objected to a sale of the next presentation, but they were stopped by the Court.

The MASTER *of the* ROLLS.

My opinion is, that I have no authority to direct the sale of the next presentation. I find that the testatrix gives her real and personal estate to certain trustees. She gives them the legal estate and the power of presentation, and she, in substance, directs the advowson shall not be sold until after the death of the present incumbent. I must impute to her a knowledge of the law, and knowing that it cannot then be sold until a clerk has been presented and the vacancy is filled up, the question is, to whom did she intend to give the right of presentation? Apparently she intended the trustees to whom she had given

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given the legal estate, or else why did she direct that the advowson should not be sold until that time?

I admit the matter is not clear; but as she directs that it is not to be sold till that period, I cannot sell the next presentation before that period arrives, which would be evading her direction and selling the most valuable part of the advowson immediately. I think therefore that I cannot now direct the sale of the next presentation.

In re CROSS'S CHARITY.

Dec. 3.

Trustees of a charity authorized to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial.

BY an indenture dated in 1822, and duly inrolled, a house and premises in *Hardshaw within Windle*, in the county of *Lancaster*, were assigned to trustees for the residue of a term of 900 years, commencing in 1635, upon trust that the trustees should, during the residue of the term, permit and suffer the minister who, for the time being, should officiate and preach at the chapel in *St. Helen's*, in *Hardshaw within Windle*, called "the Independent Chapel," to have, hold, use, occupy, possess and enjoy the said messuage or dwelling-house, buildings, land, hereditaments and premises, and to receive and take the rents and profits thereof to his own use, so long as such minister for the time being should profess to hold and embrace the doctrines and opinions therein particularly mentioned.

The present trustees and minister now presented a petition, under the act to facilitate leases and sales of settled estates (*a*), stating that the trust property had now

(*a*) 19 & 20 *Vict.* c. 120.

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In re CROSS'S CHARITY.

now become so surrounded with buildings, that the land, which could not be built upon, was considerably depreciated in value, and that it would be highly advantageous for the object of the trust that the trustees should be authorized, by the order of this Court, to grant building leases of the property for the term of 600 years.

It was the usual custom in *St. Helen's* to grant building leases for the term of 999 years.

The petition prayed that powers of granting building leases for any term not exceeding 600 years of the premises, or any part thereof, subject to the powers and restrictions in the act contained, might be vested in the trustees for the time being.

The MASTER *of the* ROLLS, being of opinion that it was proper and consistent, with a due regard to the interest of all parties interested under the deed of 1822, that a power to grant building leases for any term not exceeding 600 years, and to enter into building contracts respecting the lands, should be vested in the trustees for the time being, ordered, that a power to grant such building leases and to enter into such contracts from time to time, subject to the provisions and restrictions in the act contained, should vest in the trustees; the same to be settled by the Judge; and that this order should be indorsed on the deed of 1822.

NOTE.—*Reg. Lib.* 1859, *A.*, *fol.* 458.

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GREVILLE *v.* GREVILLE. (No. 1.)

Dec. 3.

A testatrix, after referring to a debt due from her to a partnership of *A.* and *B.* deceased, bequeathed a fund "upon trust to pay and divide the produce of such stock to and for the benefit of their respective estates." *A.* and *B.* were not partners, but one was the successor of the other. The sum of 4,517*l.* was claimed by *A.*, and 197*l.* by *B.* against the testatrix's estate. *Held*, that the fund was divisible between their estates equally, and not in proportion to the debts due to *A.* and *B.* respectively.

THE Marchioness of *Westmeath*, a married woman, having, by her will, referred to costs incurred by her parliamentary agents and solicitors, Messrs. *Leake & Berry*, in a long litigation from 1819 to 1834, and still unpaid to their representatives, appealed to the sense of justice and honor of her brother and trustee to pay it. But presuming that appeal to be ineffectual, she then gave as follows:—

"I give and bequeath unto the executors or other the personal representatives of the late *William Leake* and *Berry* (formerly of the firm of *Leake & Berry*), the sum of 2,800*l.* Portuguese Bonds of the £4 per Cent. Consolidated Stock, 50*l.* Bonds of £3 per Cent. like Stock, three and four Portuguese bonds or certificates, and all other the bonds or securities in the Portuguese funds which I am possessed of, *upon trust to pay and divide* the produce of such stocks, when realised, to and for the benefit of their respective estates."

The testatrix died in 1858.

Leake had acted as the solicitor of the testatrix from 1827 to his retirement in 1833, *Berry* being his managing clerk during that period. *Berry* succeeded to the business, and acted as her solicitor from 1833 to 1837.

The representatives of *Leake* claimed 4,517*l.* as due for costs from the testatrix's estate, and the representatives of *Berry* claimed 197*l.*

The

The representatives of *Leake* claimed to have the legacy divided between the representatives of *Leake* and *Berry*, in the proportion of the amount of their claims. On the other hand, the representatives of *Berry* insisted that an equal division should be made of the legacy between the two estates.

Mr. *Selwyn* and Mr. *Bevir*, argued that they took equally.

Mr. *Bagshawe* and Mr. *G. O. Morgan*, *contrà*, argued that the legatees took in proportion to their interest in the debt, the existence of which was the motive for making the bequest, and the intention of the testatrix, apparent on the face of her will, being to discharge it.

The MASTER *of the* ROLLS.

I think it is given to them equally. I cannot look into the circumstances of the case for the purpose of dividing the fund differently from what is stated in the will. The testatrix makes this specific bequest, upon trust to pay and divide it to and for the benefit of their respective estates. That must be equally, unless she directs a division in some other proportion.

It is impossible to say, that the legacy is to be a *pro ratâ* discharge of what was due to them from the testatrix.

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GREVILLE *v.* GREVILLE. (No. 2.)

Dec. 3, 5.

A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150*l.* as the price to be paid for a release of all claims. Legacy duty was claimed on this account. *Held*, that it must be borne by the administrator, and not by the creditor.

The costs of counsel in Chambers are always understood as being allowed, unless the contrary is expressed.

THE testatrix, the Marchioness of *Westmeath*, bequeathed some *Buenos Ayres* stock and *New Grenada* bonds, in trust to apply the proceeds between the several creditors and persons to whom debts were due in certain matters she referred to; the respective amounts to be paid so far as the produce of the said last-mentioned stocks would extend.

Under the bequest, Mrs. *Welchman* claimed, as the representative of a creditor, to participate in the bequest, for debts long barred by the Statute of Limitations.

The claim was resisted, and the solicitor of the administrator proposed by letter to Mrs. *Welchman* to compromise her claim, and that of persons named *Maguire* and *Berry*, in these terms:—"If you are disposed to accept 1,000*l.* *out of this fund*, and divide it between you, as you might agree, and give a receipt in full for all claims, he [the administrator] will ask the Court to sanction that payment." This was declined. The solicitors of the administrator afterwards wrote that the administrator authorized them to "*offer* 1,150*l.* *as the price to be paid for a release of all claims.*"

In reply, this offer was accepted, and the compromise was sanctioned. The share of Mrs. *Welchman* was 750*l.*

Legacy duty having been claimed upon all the debts established under this bequest, the question submitted to the Court was, whether, under the terms of the compromise,

promise, the Defendant, the administrator, was bound to pay the legacy duty in addition to the 750*l.* paid to Mrs. *Welchman*.

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Mr. *Selwyn* for the claimant.

Mr. *Bagshawe*, jun., for the Defendant. *Bliss* v. *Putnan* (*a*) was cited.

The MASTER *of the* ROLLS.

On reading the correspondence, I think that this was a contract to receive a fixed positive sum and not a share of the legacy. It is quite true that the claimant, in one sense, was not a creditor, that is, her debt was barred by the statute, and she could claim nothing out of the estate in that character, but she came in and claimed a share of legacy given by the Marchioness to certain persons who had been creditors, but whose rights were barred by the statute. If the contract had been, "you shall take a share of the stock and bonds," I can well have understood that it would be subject to the charges on it. I however observe that the proposal in the first letter is, "if disposed to accept 1,000*l.* out of this fund." This is rejected, and the other offer is, of "1,150*l.* as the price to be paid for a release of all claims." That is the offer which is accepted.

Mr. *Selwyn* asked the Court, as the case had been adjourned into Court from chambers, to certify it to be a proper case for counsel to attend (*b*).

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(*a*) 7 *Beav.* 40. (*b*) *Order XL, Rule* 29.

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GREVILLE v. GREVILLE. (No. 2.)

The MASTER *of the* ROLLS.

You may consider that I always so certify, unless I express an opinion to the contrary.

LOCK *v.* VENABLES.

Dec. 16.

A testatrix specifically bequeathed her *Carron Company's* shares upon trust to pay, yearly, "the dividends, interest and proceeds" to *A. B.* for life, with remainders over. She died on the 29th of *May*, but on the previous 26th of *May*, the company declared a large *bonus* on the shares, payable on the 10th of *June*. *Held*, that the *bonus* did not pass by the specific bequest.

THE testatrix, Mrs. *Pollen*, by her will dated the 31st of *May*, 1856, bequeathed an annuity of 100*l.* to Mr. *Siggers* and wife, and charged it upon her *Carron Company* stock or shares. She bequeathed to her executors all her *Carron Company's* stock or shares upon trust to continue it "in its present state of investment, for the benefit of the persons interested under her will (inasmuch as the *Carron* stock yielded a much better annual income than could be obtained from selling the same and investing the proceeds thereof in government funds or any other good security), and in the first place, from and out of the interest, dividends and annual proceeds to be received therefrom, to pay" the annuity to *Siggers* and wife, and after retaining the said *Carron* stock as a permanent investment until the trusts of her will should be fully performed, and the annuity should have been duly paid and satisfied, that the trustees should, yearly and every year, during the natural life of her niece Mrs. *Venables*, pay *the dividends, interest and proceeds* of such stock into the proper hands of her niece, for her sole and separate use, without power of anticipation. And after her decease, to pay to her great nephew Captain *Adams* the net dividends, interests and annual proceeds of the said stock during his natural life; and from and after his decease, to pay them to his wife for life, and after her decease to his children. But if her great

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great nephew should not leave any legitimate children she gave the stock to two charities. And she bequeathed her residue to her executors "upon the same trusts, and to and for the same ends, intents, and purposes as were thereinbefore expressed and declared of and concerning her *Carron Company's* stock."

The testatrix died on the 29th of *May*, 1858. She was, at the time of her decease, possessed of twelve shares in the *Carron Company*, which was a company carrying on business in *Scotland*, and was incorporated by charter under the Union seal of *Scotland*, dated the 15th day of *July*, 1773, and it was also registered under the Joint Stock Companies Act, 1844.

On the 26th day of *May*, 1858, in consequence of the compromise of a suit between the *Carron Company* and the representatives of Mr. *Stainton* (*a*), its late agent in *London*, by which the company became possessed of a large sum of money, it was resolved to declare a *bonus* of 470*l.* on each share of the stock of the company, to be payable on and after the 16th day of *June*, 1858.

Questions had been raised, between the Defendant Mrs. *Venables* and the persons entitled in remainder under the will, as to whether such *bonus* formed part of the capital of the estate of the testatrix, or was to be considered as income, and also as to who was entitled to such *bonus*.

By the decree, an inquiry was directed as to the circumstances relating to this *bonus*.

The Chief Clerk certified the facts to be as follows:— The executors, on the 4th of *September*, 1858, received 5,640*l.*,

(*a*) *See ante*, p. 460.

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5,640*l.*, being the amount of a *bonus* of 470*l* a share upon the testatrix's twelve shares in the company. The *bonus* was declared pursuant to a resolution passed at an adjourned general court of *Carron Company* held at *Edinburgh* on *Wednesday* the 26th of *May*, 1858, in the lifetime of the said testatrix, and the following is an extract from the minutes of such meeting:—" The manager stated, that he had called the present meeting for the purpose of deliberating as to the best mode of applying the large sum of which payment had now been obtained by the company, under the compromise of the suits with the late Mr. *Stainton's* representatives, and the meeting, having taken that matter into consideration, *Resolved* to declare a *bonus* of 470*l.* on each share of the company's stock in the hands of the partners, payable at *Carron* on or after the 10th day of *June* next." In consequence of such resolution, *William Dawson*, the manager of the company at *Carron*, wrote a letter to the testatrix, dated the 29th day of *May*, 1858, informing her of the *bonus* and that there would, accordingly, be payable to her, on or after *the 10th day of June then next*, the sum of 5,640*l.*, being the amount of the bonus of 470*l.* on each of her twelve shares of the stock of the company. Such letter was delivered at the testatrix's residence at *Wimbledon* on the 1*st day of June*, 1858, when the same was received by the Plaintiffs as executors of the testatrix, who had died at her residence on *the 29th day of May*, 1858. The *bonus* of 470*l.* per share was made payable on the 10th day of *June*, 1858, and the sum of 5,640*l.*, together with the sum of 19*l.* 9*s.* 4*d.* for interest (making together the sum of 5,659*l.* 9*s.* 4*d.*), was, on the 12th day of *August*, 1858, remitted by *William Dawson* to the Plaintiff's executors, by a bankers' draft for that amount, and was received by the Plaintiffs at the maturity of the said draft on the said 4th day of *September*, 1858.

The

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The cause now came on for further consideration.

Mr. *R. Palmer* and Mr. *Dickinson*, for the Plaintiffs (being required by the Court to argue the case in favor of the possible issue of Capt. *Adams's* children), contended, that the fund formed capital and not income, and did not pass to the specific legatee, for, first, the source from which it was derived was from a compromise with *Stainton*, who restored, to the rightful owners, the profits which had been accruing for several previous years, and in the life of the testatrix. That it did not consist of ordinary annual profits, but of the accumulation of income, for a long period lying dormant. Secondly, that even if it were considered in the nature of dividends or income, still the declaration of dividend having been made prior to the death of the testatrix, it was severed from the stock and might have passed by mortgage or assignment, nothing remaining to be done but to receive it, and that it therefore belonged to her estate, and not to the specific legatees of the shares. They cited *Brander* v. *Brander* (*a*); *Paris* v. *Paris* (*b*); *Wilts* v. *Steere* (*c*); *Barclay* v. *Wainewright* (*d*); *Ward* v. *Combe* (*e*); *Carlisle* v. *The South-Eastern Railway Company* (*f*); and see the note to *Gilley* v. *Burley* (*g*).

Mr. *Toller* and Mr. *Eddis* for the annuitants.

Mr. *Pownall* and Mr. *Ware* for the charities argued, that a transfer of the shares after the declaration of the *bonus* would not have passed the *bonus*, unless specifically mentioned, in the same way as the transfer of Consols after a dividend had become due would not pass the dividends, though not paid.

Mr.

(*a*) 4 *Ves.* 800.
(*b*) 10 *Ves.* 165.
(*c*) 13 *Ves.* 363.
(*d*) 14 *Ves.* 66.
(*e*) 7 *Sim.* 634.
(*f*) 1 *Mac. & Gor.* 689.
(*g*) 22 *Beav. p.* 624.

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Mr. *Lloyd* and Mr. *B. L. Chapman*, for Mr. and Mrs. *Venables*, argued, that the *bonus* constituted income, and that the right to it was not absolute until the day appointed for payment, that it therefore passed with the *corpus* to the legatee and must be considered the "proceeds of the stock." They cited *Preston* v. *Melville* (*a*); *Hebert* v. *Bateman* (*b*); *Price* v. *Anderson* (*c*); *Johnson* v. *Johnson* (*d*); *Paton* v. *Sheppard* (*e*), and see *Gorst* v. *Lowndes* (*f*).

The MASTER *of the* ROLLS.

In this case, the *bonus*, having been actually declared in the testatrix's life, though the right to receive it did not accrue until a somewhat later period, cannot be treated as part of the annual profits or proceeds which accrued after her death. It is part of her personal estate. It resembles the case of Consols, the dividends are declared on the 5th of *January*, they then belong to the owner of the stock, but practically they are not paid until two or three days after, and if the owner went on the morning of the 5th he would not get them.

Here the *bonus* was profits of the stock accrued before the death of the testatrix, and was part of her personal estate in every sense of the term, though it was payable subsequently.

(*a*) 16 *Sim.* 163.
(*b*) 1 *W. Rep.* 191.
(*c*) 15 *Sim.* 473.
(*d*) 15 *Jur.* 714.
(*e*) 10 *Sim.* 186.
(*f*) 11 *Sim.* 434.

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GORDON *v.* WOODFORD.

Dec. 14, 19.

A tenant for life, without impeachment of waste, in order to preserve the timber, assigned for valuable consideration "all timber and timber-like trees then growing and being, and which should thereafter grow and be, upon the estate." *Held*, that this included both ordinary timber, and that which, by the custom of the county, was considered timber and that the thinnings, and the rights of determining what were proper thinnings, belonged to the grantees.

BY a settlement dated in 1834, an estate called *Water End* and *Derwent Bank*, situate on the margin of *Keswick* or *Derwent Water Lake*, near *Keswick*, in the county of *Cumberland*, was conveyed to the use of Sir *John George Woodford* for his life without impeachment of waste, with remainder to the use of his sons in manner therein mentioned, with remainder to the use of Sir *Alexander Woodford* for his life without impeachment of waste, with remainder to the use of his sons as therein mentioned, with remainder to the use of Sir *John George Woodford* in fee. The settlement contained a power for the trustees to sell, at the request of Sir *John George Woodford*.

The first tenant for life, Sir *John George Woodford*, was now in the seventy-fifth year of his age, and had never been married.

An indenture dated the 25th of *March*, 1854, was made between Sir *John George Woodford* of the first part, Sir *Alexander Woodford* of the second part, and his sons and the trustees of the settlement of the other parts. It recited, as the facts were, that Sir *George Woodford* had abstained, for several years then past, from felling any part of the timber growing on the unsold part of the settled estates, which timber was of considerable intrinsic value, far exceeding the sum of 5,000*l.*, and that the sale of such timber formed the chief and nearly the only source of income derivable from the estates, and that the timber had consequently

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grown up into ornamental and valuable timber, which had greatly enhanced the value of the estate, and that it was believed, that from the ornamental and picturesque character of the estate, it would sell for a much larger amount, and far beyond the intrinsic value of the timber, if sold with the timber standing thereon, than if the same should be felled and severed from the estate, and that it was therefore considered that it would be greatly for the benefit of all the persons entitled to the estate, in remainder expectant upon the decease of Sir *John George Woodford*, that the timber should be allowed to remain upon the estate. It also recited, that Sir *John George Woodford* had become involved in certain liabilities mentioned in the third schedule, which had been mainly incurred by reason of his abstaining from felling the timber; and also recited an agreement of the 6th of *December*, 1853, whereby it had been agreed, that the trustees should purchase of Sir *John George Woodford* all his right and interest in the timber then growing on the hereditaments comprised in the settlement for 5,000*l.*, for the benefit of the persons interested under such settlement, and that no timber should thereafter be cut by Sir *John George Woodford* upon any part of the settled estates. The deed then witnessed, that in consideration, &c. &c., Sir *John George Woodford* did grant, release and assign unto the trustees "*all and singular the timber and timber-like trees then growing and being, and which should thereafter grow and be, upon the lands* and hereditaments comprised in the first and second schedules to the now stating indenture, or any part thereof, or upon any other lands which might, for the time being, be subject to the uses of the indenture of settlement, and to which Sir *John George Woodford* had or after the execution of the now stating indenture would have, as tenant for life without impeachment of waste, power to cut or fell and

and dispose of for his own use and benefit, to hold the same upon the trusts of the settlement," but freed and absolutely discharged from the right or power of the Defendant Sir *John George Woodford* to cut or fell any of such timber or timber-like trees, to the intent that the same might go along with the hereditaments as part and parcel thereof. And Sir *John George Woodford* covenanted with the trustees, that he "would not, at any time or times thereafter, fell or cut, or cause or procure to be felled or cut, any part of the said timber or timber-like trees then growing and being, or which might thereafter grow and be, upon the said hereditaments," but would, to the utmost of his power, protect and preserve the same from injury.

Sir *John George Woodford* having cut down timber and other trees on the estate, this suit was instituted by the trustees, against him and the parties entitled in remainder, praying that Sir *John George Woodford* might be decreed to account for the value of all the timber and other trees felled or cut down by him on the hereditaments comprised in the indenture of 1854; and that he might be decreed to pay the Plaintiffs what should appear to be due to them on taking such account, and that he might "be restrained from cutting down any timber or other trees, and from committing any other waste on the said premises."

On the 8th of *February*, 1859, an injunction was awarded against Sir *John George Woodford*, to restrain him, his servants, workmen and agents, from cutting down any timber or other trees, and from committing any other waste upon the hereditaments and premises comprised in the first and second schedules to the indenture of 1854, until he should appear to and fully

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answer the Plaintiffs' bill, or this Court may make other order to the contrary.

A motion was now made for a decree and a cross-motion to dissolve the injunction.

Sir *John G. Woodford*, in person, argued, amongst other things, that the operation of the deed of 1834 was limited to timber, and to such wood as, in the ordinary mode of management, would hereafter become timber-like. That it therefore did not prevent his thinning the woods in a proper manner, and from employing so much of the thinnings as was necessary in fencing and for other purposes on the property, and from applying the remainder to his own use.

Mr. *R. Palmer* and Mr. *Speed* for the Plaintiffs.

Mr. *Jessel* for the remainderman.

The MASTER *of the* ROLLS.

Dec. 19. This is a suit instituted for the purpose of restraining the tenant for life of certain property at *Keswick*, from cutting down certain timber and other wood on the estate. The state of the case is this:—The Defendant was tenant for life without impeachment of waste; it was therefore in his power to cut down the whole of the timber on the estate. He got into difficulties and the state of his circumstances being such as to make ready money a matter of importance to him, he executed a deed, by which, in consideration of a considerable sum, he assigned to the trustees "all the timber and timber-like trees then growing and being, and which should thereafter grow and be," upon the estate. He also entered

tered into a covenant not to cut such timber and would "to the utmost of his power protect and preserve them from injury."

With respect to the timber and timber-like trees, the first question is, what it includes. It includes all wood which is considered timber everywhere, as oak, ash and elm. It also includes all that species of wood which is timber by the custom of the county in which the estate is situated, and evidence is given, that what is not ordinarily considered timber in other counties is timber in this.

The next question, which is one of very considerable importance, is, as to the thinnings. The principal part of the property consists of wood, and it is a matter of considerable importance, not only that it should be properly thinned, but that the thinnings should be employed and used on the estate for fencing and other matters, and that would seem to be the legitimate and proper purpose to apply them to. But the question here is, to whom do the thinnings belong, and who is to have the right of judging what ought and what ought not to be cut. I am of opinion that it is impossible to get out of the words "shall *hereafter* grow and be upon the said lands." They not only include the existing trees, but those to grow in future, every sapling then growing, however young, is therefore comprised in the deed.

I do not express any opinion whether that was the intention of the parties, but as long as the deed stands in its present form I have only to construe it, and I am of opinion, that, as all the wood belongs to the trustees, it is for them to determine what thinnings are proper for the future.

My

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My decision simply is that the thinnings belong to the trustees, and it is for them to determine what should be cut.

The injunction must be made perpetual, but must be varied by changing the words "other trees" into "timber-like trees."

Re ANDREW'S WILL.

Dec. 21.

A testator gave the interest of all his money in the funds to his daughter *C. S.*, and he desired his outstanding money to be put into the funds. He then desired the interest of the moneys directed to be put into the funds to be paid to his daughter *C. S.*, "as and for her own and issue's proper moneys." But in the event of her dying without issue, he desired the whole of his funded property to be divided between his brothers and sisters and their children. *C. S.* died without issue. *Held*, that she took the funds absolutely, and that the gift over was inoperative.

THE testator, *Edward Andrews*, made his will, dated in 1835, which, omitting the formal parts, was as follows:—

I give, devise and bequeath all those my messuages [describing them], and all other my real estate whatsoever, wheresoever situate, unto my beloved daughter *Catherine Stammers*, wife of *John Stammers*, and the heirs of her body lawfully begotten or to be begotten; and for want of any such issue, I devise and direct that all and singular the said hereditaments and premises and real estate whatsoever be immediately sold, and that the moneys arising from the said sale be fairly and equally divided between my brother *Thomas*, my brother *Daniel*, my sister *Ann Kenward*, and between all the children of my aforesaid brother *Thomas*, share and share equally alike.

I give and bequeath all the interest of all my moneys in the public funds to the aforesaid *Catherine Stammers*, after my brother *Thomas*, my brother *Daniel* and my sister *Ann Kenward* have first received 100*l.* each out of my funded property. I devise and desire that all my

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my moneys standing out and owing to me be paid to and gathered in by the executor and executrix hereafter named, and to be by them put into the public funds within thirty days after the money or moneys have been so paid and gathered in. I devise and desire that the additional interest of the moneys so put into the public funds be duly and truly paid to my beloved daughter *Catherine Stammers*, as and for her own and issue's proper moneys; but, in the event of her dying without issue, I devise and desire that the whole of my funded property be taken out and fairly and equally divided between my brother *Thomas*, my brother *Daniel*, my sister *Ann Kenward*, and to all the children of my aforesaid brother *Thomas*, share and share alike.

The testator died in the month of *February*, 1837, and shortly afterwards, his executor and executrix transferred into their own names the sums of 1,750*l.* £3 per Cent. Reduced, and 1,048*l.* 15*s.* 6*d.* £3 per Cent. Consolidated Bank Annuities, being the whole of the testator's funded property at the death, after the payments thereout directed by his will, and the amount purchased, after his decease with the residue of his personal estate.

These funds were paid into Court and the income received by *Catherine Stammers* during her life. She died in *September*, 1859, without having had any issue, and her husband, having taken out administration to her, presented the present petition for payment to him of the fund.

Mr. *R. Palmer* and Mr. *T. J. Humphry*, in support of the petition. This case is not governed by *Ex parte Wynch* (*a*), for in that case a life interest only was expressly

(*a*) 1 *Smale & G.* 427, *and* 5 *De G. M. & G.* 188.

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pressly given, but here interest of the fund is given to the testator's daughter, and an unlimited gift of the interest of a fund passes the capital; *Humphrey* v. *Humphrey* (*a*). The word *issue* is one of limitation, and as it would give an estate tail in the realty, it therefore passes an absolute interest in the personalty; *Lyon* v. *Mitchell* (*b*). The gift over in the event of the daughter's dying without issue is inoperative, as in *Campbell* v. *Harding* (*c*). They also referred to *Stokes* v. *Heron* (*d*); *Tate* v. *Clarke* (*e*); *Procter* v. *Upton* (*f*).

Mr. *Selwyn*, Mr. *Boyle* and Mr. *Druce*, *contrà*, insisted that the testator's brothers *Thomas* and *Daniel*, and his sister *Ann*, and the children of the brother *Thomas*, were entitled to the fund. They argued that *Wynch's Case* laid down the doctrine that the rules of tenure did not apply to personal estate, and that this decision was equally applicable to the rule in *Wild's Case* as to that in *Shelley's Case*. That this was a gift of a life interest in the fund, and that the issue took as purchasers with a valid gift over of the *corpus*, in default of issue, to persons named in the will. That the rule was now settled that where there was a gift to a parent and his issue, the parent *primâ facie* took a life interest only; *Audsley* v. *Horn* (*g*); *Leeming* v. *Sherratt* (*h*); *Webster* v. *Parr* (*i*).

The MASTER *of the* ROLLS.

I quite concur in the decision in the case of *Ex parte Wynch*,

(*a*) 1 *Sim.* (*N. S.*) 536; and see *Elton* v. *Shepard*, 1 *Bro. C. C.* 532; *Page* v. *Leapingwell*, 18 *Ves.* 463; and *Haig* v. *Swiney*, 1 *Sim. & St.* 487.
(*b*) 1 *Madd.* 467.
(*c*) 2 *Russ. & Myl.* 390.
(*d*) 12 *Clark & Fin.* 161.
(*e*) 1 *Beav.* 100.
(*f*) 5 *De G., M. & G.* p. 199, *note.*
(*g*) 26 *Beav.* 195, *affirmed by Lord Campbell.*
(*h*) 2 *Hare*, 14.
(*i*) 26 *Beav.* 236.

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Wynch, which is a very valuable one and sets at rest the discrepancy between the decisions in *Knight* v. *Ellis* (*a*) and *The Attorney-General* v. *Bright* (*b*). It establishes that where an express life interest in personalty is given or clearly expressed to *A. B.*, with a gift to *A. B.'s* issue, *A. B.* takes a life interest only, but I cannot spell out a life interest in this will.

The scope of the will was this:—as to the real estate the daughter was tenant in tail, with a gift over on failure of her issue; but with respect to the personal estate she took an absolute interest, with a gift over if her issue should fail. Probably the testator supposed that the law would give effect to both these dispositions, and that if she died without issue the real and personal estate would both go over. But practically the law gives effect to neither; it enables the person who takes the real estate to destroy all the gifts over by a disentailing deed, and there being an absolute interest in the personal estate in default of issue, no gift over takes effect.

There are two gifts of the personal estate. The first is an absolute gift to *Catherine Stammers* of all the interest of all his moneys in the public funds. What is the effect of that? It is a gift of the interest for ever to *Catherine Stammers*, and if it stood there, her children would have taken no interest at all.

The other gift is of the moneys owing to him. These are to be gathered in and put into the public funds, and he directs that the additional interest thereof should be paid

(*a*) 2 *Bro. C. C.* 570. (*b*) 2 *Keen*, 57.

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paid to his daughter as and for her own and her issue's proper moneys. What is the effect of that? He knew that she had no issue or child at that time. It is clear that it would give her an absolute interest in the fund, and the cases of *Knight* v. *Ellis* and *Ex parte Wynch* do not touch it. Having done that, he says, "but in the event of her dying without issue, I devise and desire that the whole of my funded property be taken out and fairly and equally divided between my brothers." He supposed, erroneously, that if she died without issue, he could create new interests.

I think the scope and object of the will is to give his real estate to his daughter in tail, and an absolute interest in his personal estate, adding thereto a springing bequest in case of her death without issue, which he could not do.

I am of opinion she took an absolute interest.

1859.
Dec. 22.

REMNANT *v.* HOOD. (No. 2.)

1860.
Jan. 13.

The Court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the Plaintiff, are identical. Therefore, the bill being dismissed with costs, each of such persons gets his separate costs. But a trustee and his *cestui que trust* gets but one set of costs between them; and so the person entitled to a share and all his incumbrancers have but one set of costs, which is payable to the first incumbrancer.

AFTER this case had been decided (*a*), a question arose as to the decision of the Court in regard to the costs, and the matter was mentioned to the Master of the Rolls in Chambers by Mr. *Colville*, the registrar. The Master of Rolls then came to a conclusion, that only one set of costs ought to be allowed in respect of all the subsequent incumbrancers on the estate.

In consequence of this, a notice of motion was given to vary the minutes, as handed out by the registrar in accordance with that ultimate direction.

Mr. *R. Palmer* and Mr. *F. T. White* for the Plaintiff.

Mr. *Lloyd*, Mr. *Bagshawe*, Mr. *Nalder*, Mr. *Faber*, Mr. *Martineau* and Mr. *Shapter* for the Defendants. *Van Sandau* v. *Moore* (*b*), and *Greedy* v. *Lavender* (*c*), were cited.

The MASTER *of the* ROLLS.

Jan. 13.

I have carefully gone through this matter again, and I think it is clear what the principle was upon which I decided the question of costs at the hearing. From the date of the offer to pay the Plaintiff, which was made in *March*, 1858, the Plaintiff was to pay the costs of

(*a*) *See ante*, p. 74.
(*b*) 1 *Russ.* 441, *reversing* 2 *Sim. & St.* 509.
(*c*) 11 *Beav.* 417.

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of the suit in the ordinary and usual manner; that is, the costs of all parties, but only one set of costs where there were trustees and *cestuis que trust*, was given where there was an interest mortgaged and sub-mortgaged. Any subsequent discussion ought to have been confined to ascertaining what I then decided. There would be little difficulty, I think, in carrying that into effect; but it appears that I had the question brought before me in chambers by Mr. *Colville*, the registrar, and I have now reconsidered the whole matter.

I think the opinion I expressed at the hearing is the correct one, and that the costs of all parties must be paid, subject to the qualification I have expressed, and which is the usual direction given by the Court in such cases. The only question (if there be any) is the way in which this principle is to be worked out. The Court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the Plaintiff, are identical. I think that I have no right to make the Defendants suffer by reason of their not having adopted that course, the more so, when I am informed that the Plaintiff exhibited interrogatories to each of the Defendants, and required and obtained separate answers from each of them.

NOTE.—The decision in *Remnant* v. *Hood* was affirmed by the Lords Justices, *November*, 1860.

1860.

MAUD *v.* MAUD.

March 28.

A testator, referring to his daughter in his will, said, "should she follow the paths of virtue and obedience to the wishes of my dear wife and my executors, they may give her, by instalments, when they think proper, the sum of 200*l.* The executors disclaimed. *Held*, that the daughter was entitled to payment of 200*l.*

THE testator, by his will dated in 1850, bequeathed to the Defendant, his wife, certain specific legacies and a pecuniary legacy of 100*l.*, and he thereby gave special directions as to his household furniture, plate and stock in the funds; and appointed *Bailey* and *Bartleet* executors and trustees thereof.

The testator made the following codicil to his will:—

"*John George Maud* makes this his codicil this day, the 29th of *October*, 1857:—

"I renounce *Levinia Bailey Maud* his daughter from any benifet arising from his will, but should she follow the paths of paths of virtue and obedience to the wishes of my dear wife and my executors, they may give her, by enstalments, when they think proper, the sum of 200*l.*"

The testator died in 1858, possessed of personal estate (other than that specifically bequeathed) to the amount of about 1,480*l.*

Bailey and *Bartleet* renounced the executorship of the will, and letters of administration, with the will and codicil annexed, were granted to the Defendant, the testator's widow. The Plaintiff, *Lavinia Bailey Maud*, applied to her for her legacy of 200*l.*, but the Defendant, though admitting assets, denied the Plaintiff's right thereto. The Plaintiff instituted this suit against the widow to recover the legacy.

Mr. *Batten* for the Plaintiff.

Mr. *Eddis*

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MAUD v. MAUD.

Mr. *Eddis* argued that the gift was not absolute, but dependent on the conduct of the Plaintiff, as prescribed by the codicil, which merely enabled the executors to give her the amount in certain events. He cited *Tattersall* v. *Howel* (*a*).

The MASTER *of the* ROLLS held that the Plaintiff was entitled to payment of the legacy, with interest and costs.

(*a*) 2 *Mer.* 26.

1859.
Nov. 25, 26.
Dec. 2.

LYALL *v.* HICKS.

A shipowner, in his written instructions to the captain, directed him, in case of emergency, to apply to certain firms abroad, "who would give him any assistance required." *Held*, that this did not authorize the captain to do anything not included in his general power and authority as captain.

To authorize a captain to hypothecate the ship or freight for repairs, the necessity for such hypothecation must exist; if, therefore, the agent of the shipowner in a foreign port has sufficient funds in his hands for the repairs, the captain cannot hypothecate.

THE Defendant Mr. *Hicks*, the owner of a ship called "*Carnatic*," of which *Suckling* was the master, had despatched it to the *East Indies*. When *Suckling* sailed from *England*, Mr. *Hicks* gave him written instructions as to the voyage, which contained these words:—"in case of emergency, you will apply to any of the under-mentioned firms, *who will give you any assistance required*." The Plaintiffs, Messrs. *Lyall*, were one of the firms under mentioned.

The ship arrived at *Calcutta* in the month of *July*, 1857; and the Plaintiffs Messrs. *Lyall* (the agents of Mr. *Hicks* at *Calcutta*) entered into a contract with the *Coolie Emigration Company* at *Calcutta*, by which *Suckling* was to take a cargo of *Coolies* to the *Mauritius*. For this purpose, under the government regulations, great repairs and alterations became necessary to be made in the ship: and the expenses amounting to 1,958*l.* 8*s.* 11*d.*

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1,958*l.* 8*s.* 11*d.* were paid by the Plaintiffs. At this time, the Plaintiffs had in their hands money, or its equivalent, viz. a bill belonging to *Hicks*, amounting to 1,895*l.*, which might have been applied towards the repairs and alterations of the ship. Instead of so doing, they, at the request of *Suckling*, gave him the bill to be otherwise disposed of. To repay the Plaintiffs the sum of 1,958*l.* 8*s.* 11*d.* advanced for the repairs, *Suckling* drew a bill on Mr. *Hicks* for that amount, dated the 19th of *September*, 1857, and payable three months after sight. He gave this bill to the Plaintiffs who duly forwarded it for acceptance. It was subsequently accepted by *Hicks*, but was dishonored, as after stated.

In *November*, 1857, the cargo having been discharged at the *Mauritius*, the captain obtained from Messrs. *Chawin*, the correspondents of Mr. *Hicks* at that place, an advance of 2,000*l.* upon the security of the freight, in the shape of a bill of exchange for 2,000*l.*, which bill *Suckling* remitted to *Hicks*.

In *October*, 1857, *Hicks* accepted the bill of exchange for 1,958*l.* 8*s.* 11*d.*, drawn on him by *Suckling* in favor of the Plaintiffs; but *Hicks* having, in *November*, 1857, suspended his payments and executed a creditors' deed, this bill was dishonored. The other bill for 2,000*l.* was sent from the *Mauritius* to *London*, and was received by the inspectors appointed under the creditors' deed to wind up *Hicks's* estate.

The Plaintiffs instituted this suit in *November*, 1859, against *Hicks*, and the persons claiming under the creditors' deed, alleging that *Suckling*, being authorized by *Hicks*, had requested the Plaintiffs, instead of setting off the amount advanced by them against the 1,895*l.* bill, in their hands, to permit *Suckling* to have the bill, in order

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order that he might remit the same to *Madras* to discharge some claims against the ship, and in lieu thereof to receive payment of the amount advanced out of the freight payable at the *Mauritius*. They alleged that they had agreed to do so, on having a lien on the freight, and that *Suckling* "thereupon, being expressly or otherwise duly authorized by *Hicks*, agreed with the Plaintiffs, that the amount of such advances should be a charge or lien upon, and should be paid out of the moneys to be received in respect of, the said freight."

It alleged that Messrs. *Chawin* had been repaid their advance out of the freight, and that their bill of 2,000*l.* constituted or represented a portion of the freight, and as such, became subject to the Plaintiffs' lien or charge.

The bill prayed a declaration that the Plaintiffs were entitled to a charge on the bill of exchange of 2,000*l.* for the amount due to them, and for an injunction to restrain the Defendants from negotiating the bill for 2,000*l.*, and from distributing it amongst *Hicks's* creditors, without satisfying the Plaintiffs' charge.

A motion was now made for an injunction.

Mr. *R. Palmer* and Mr. *De Gex*, for the Plaintiffs, argued, that *Suckling* the master was authorized by *Hicks* to obtain the necessary funds for the ship, and to hypothecate it for that purpose. That the master had a lien on the freight for all moneys expended by him on the ship on behalf of the owners; that his liability as drawer of the bill for the repairs gave him a lien on the freight, and that the Plaintiffs were entitled to the benefit of this lien; *Bristow* v. *Whitmore* (*a*).

That

(*a*) 1 *Johnson*, 96; *since reversed by Lord Campbell* (*L. C.*), 6 *Jur.* 29.

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That the second bill for 2,000*l.* represented the freight and had been specifically appropriated for payment of the first bill of 1,958*l.* 8*s.* 11*d.*; *Ex parte Gladstones* (*a*).

Mr. *Selwyn* and Mr. *Jessel*, for the Defendants, argued, first, that the master had no general authority to pledge the freight, and no special authority by the letter, which was limited to obtaining "assistance" merely. Secondly, that no contract had, in fact, been entered into, by which the freight was pledged to the Plaintiffs. Thirdly, that if the master had authority and had entered into the contract alleged, still that the absence of necessity rendered the hypothecation invalid, for it had been decided, that in the home port or at a place where the shipowner had an agent, the captain could not borrow money or hypothecate the ship or cargo. Here, instead of paying for the repairs of the ship out of the bill for 1,895*l.* (as they were bound to do), the Plaintiffs had advanced a sum of 1,958*l.* to the captain, and handed him over the bill to deal with as he pleased. Fourthly, that the second bill for 2,000*l.* was not a remittance on account of freight, but was drawn to secure the repayment of an advance of money on freight before it had become due. Lastly, that the master had no lien for his outlay; *Ex parte Halkett* (*b*).

Mr. *R. Palmer* in reply.

The MASTER *of the* ROLLS.

Dec. 2.

Upon a perusal of the evidence, I am of opinion that the Plaintiffs have failed to make out any case which would

(*a*) 3 *Mont., D. & De G.* 109. (*b*) 3 *Ves. & B.* 135.

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would justify the Court in granting any such injunction as is required.

The Plaintiffs say, that *Suckling* entered into a verbal contract with them to give them a lien upon the freight to be earned by the voyage to the *Mauritius*, and which the money advanced by them enabled the ship to perform. I think this case is not established upon the evidence before me, and I think that *Suckling* had no specific or general authority to bind Mr. *Hicks* by any such contract. I think also that the evidence does not shew that any such contract was, in fact, made. Special authority *Suckling* clearly had not; the only authority that can be adduced is to be found, if at all, in these written instructions given by Mr. *Hicks* to *Suckling* when he left *England*:— "in case of emergency, you may apply to any of the under-mentioned firms, who will give you any assistance required," the Plaintiffs being one of such firms. I am of opinion that this gave no special authority of any sort. So far as regards the present question, it only requires the captain, if he wanted assistance at *Calcutta*, to apply to the Plaintiffs for that assistance, but it did not give him any authority to do anything not included in his general power and authority as master.

With respect to the general power and authority of the master to hypothecate the ship and freight for necessary repairs, no question can now be raised; but, as was justly observed in argument, the necessity for such hypothecation must exist. In this case, the Plaintiffs, the agents of *Hicks*, had in their hands, money or a bill which was equivalent to money, amounting to within 63*l.* 8*s.* 11*d.* of the whole sum required for the repairs of the ship, and which might have been applied for that purpose. Instead of applying the money for that

that purpose, they gave it to the master, at his own request, to be otherwise disposed of. The mode of application of that money by the master is, in my opinion, wholly immaterial. It was money of *Hicks* in the hands of the Plaintiffs, sufficient or nearly sufficient to defray the expense of the repairs necessary to enable the ship to perform the contract that they had entered into on their part with the *Emigration Company*. It cannot be said, that in such a case, a necessity exists of hypothecating either the ship or the freight for the purpose of obtaining that money. It does not appear that any one could have claimed or stopped the money, or prevented its application towards defraying the expenses of the necessary repairs, neither does it appear that any one possessed or claimed to possess any right of stopping the sailing of the ship. It was, therefore, a mere voluntary surrender of the money of *Hicks* to the master, to be applied by him in a manner he thought advantageous to his employer's interest; not in defraying any lien or hypothecation either on the ship or its freight then existing, and which must have been paid in order to free the vessel and enable her to complete her voyage to the *Mauritius*.

I am also of opinion, that the facts in evidence relating to the advance of the 1,958*l.* 8*s.* 11*d.*, by the Plaintiffs, do not constitute any charge or lien upon the freight. *Primâ facie* had any such been made, the personal liability of Mr. *Hicks* as owner could not have been affected, and some notice of hypothecation would, in the ordinary course of business, have been given to him either by the Plaintiffs or by the captain, and some steps would have been taken by the Plaintiffs to secure the application of the freight, exclusively, in the first instance, to the payment of their charges. But nothing of this sort occurs. Both the Plaintiffs and the master

 write

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write to Mr. *Hicks*, neither of them mentioning any hypothecation of the freight, although writing about the advance and forwarding a bill of exchange for acceptance. On the contrary, the only mode in which they seemed to have considered that the freight could be made applicable to the payment of the bill was, by the produce of the freight at the *Mauritius* being sent to Mr. *Hicks* as soon as possible, in order to enable him thereby to be in funds to meet the bill.

This is consistent with the case stated by the master. He states it thus:—"I arranged with Messrs. *Lyall*, the Plaintiffs, that the government bill to the amount named was to be transmitted by them to Messrs. *Shand* of *Madras*, instead of the proceeds being appropriated by them for the advance they were about to make to me for the ship. In consideration of their not so appropriating the proceeds of the government bill, I promised to remit to them the amount of freight payable in the *Mauritius*." This is not inconsistent with the case stated by the Plaintiffs. They state it thus:—"*Suckling* thereupon being expressly or otherwise, as I believe, duly authorized by the said Mr. *Hicks*, in that behalf, agreed with me and my said firm, that the amount of such advance should be a charge or lien upon and should be paid out of the moneys to be advanced to them in respect of the freight." That puts it as if it were upon the ground of authority; but with the exception of the word "lien," it does not differ from the statement made by the master, and accordingly, in accordance (as it appears to me) with the arrangement between the parties, the proceeds of the freight were remitted by *Suckling*, and, as he seems to have thought, in pursuance of his engagement, in order to enable Mr. *Hicks* to meet the bill. But however this may be, the agreement, in my opinion, is not so clearly

clearly stated or proved that I could act upon it when only made by parol, and inconsistent with the written documents which accompanied the transaction and with the acts of the parties themselves.

I think nothing turns upon the question which was raised upon the lien of the captain on the freight, for which the authority of the case of *Bristow* v. *Whitmore* (*a*) was cited. The transaction clearly was not the case of a lien claimed by the master and assigned by him to the Plaintiffs. It was nothing more than the master drawing upon the owner of the vessel a bill which was accepted by him, and which all persons thought that *Hicks* would be able to meet. It is true no doubt that the master, *Suckling*, is liable as the drawer of the bill, but it is equally clear to me, that as he has obtained no benefit by the transaction, so also the Plaintiffs placed no reliance upon his responsibility, or upon any right of his to any lien on the freight; on the contrary, their case is, in my opinion, inconsistent with any such supposition as to a lien upon the freight vested in the master. They claim a lien upon the freight not belonging to the master and assigned by him, but one given to them on the freight in the nature of bottomry, by virtue of the general authority he possessed as master of the vessel.

My opinion is clear that they trusted to the credit of *Hicks*, and he having failed they must take their share of the general assets with the other creditors.

(*a*) 1 *Johnson*, 96.

1860.

Jan. 13.

THURLOW *v.* TREEBY.

The 4 & 5 *Will.* 4, c. 82, s. 2, is superseded by the 31st General Order of 1845, and therefore, unless the Defendant has been in the jurisdiction within two years before the bill filed, the Court cannot, by way of substitution for the ordinary service of process, direct notice in the *Gazette*.

IN *September* 1858, the Plaintiffs, the mortgagees of some house property, instituted this suit against *Treeby*, the mortgagor, for a foreclosure. Upon inquiry it was found that *Treeby* had left this country *four or five years ago* and he was supposed to be in *Australia*.

In *February* 1859, the usual order was made, under the 33rd Order of *May*, 1845 (*a*), for liberty to serve him in *Australia*. Inquiries were made for him in *Australia*, and every endeavour made to serve him with process, but they proved unavailing, as he could not be found there.

A motion was now made for liberty to enter an appearance for him, in order that the Plaintiffs might proceed to take the bill *pro confesso*. A point was raised, whether it was now possible to make an order for substituted service on him, but no agent or place could be suggested, on whom or at which such service could be properly effected.

Mr. *Bristowe*, in support of the application, observed on the hardship to which the Plaintiffs would be subjected, if they were left without the means of realising their security, and be liable to be redeemed and have the accounts taken at a distant period. He said that as the Defendant had not "been within the jurisdiction of the Court at some time not more than two years before" the bill was filed, it was difficult to bring the case within the 31st Order of 1845; but that the 4 & 5 *Will.* 4, c. 82, s. 2, by which service of process might be substituted "in such manner as the Court should think reasonable and direct," contained no restriction; and that, under it, this Court might order the usual advertisements

(*a*) *Ord. Canc.* 297.

advertisements in the *London* Gazette, and, in default of appearance, direct one to be entered for the Plaintiffs.

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THURLOW v. TREBY.

The MASTER *of the* ROLLS was of opinion that the statutory enactment was superseded by the General Order; and he said, that unless the service could be properly substituted on some agent of the Defendant, the Court was powerless, and that the Plaintiffs had no remedy, though the case was one of great hardship.

NOTE.—*Ord. Cun.* 295, *and* 10*th Cons. Ord., Rule* 6.

MORRES *v.* HODGES.

1859. *Dec.* 13. 1860. *Jan.* 12, 16.

By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents or by mortgage. A renewal became impracticable. *Held*, that the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life.

BY the settlement made on the marriage of Mr. and Mrs. *Hodges*, and dated in 1819, a moiety of an ecclesiastical lease of the glebe and tithes of *Upleadon*, held of the Dean and Chapter of *Gloucester*, was assigned to three trustees, upon trust, that they should pay the rents and perform the covenant, and *should use his and their utmost endeavours to renew, upon reasonable terms*, the then present or their future lease of the said glebe and tithes which should, for the time being, be subsisting, and in order thereto, should, with and out of the rents, issues and profits of the said shares or share of and in the said glebe and tithes, or by mortgage or other disposition of the same shares and share, or any part thereof, raise money sufficient to defray the expense of renewing such then present or then future lease, or such part of the said moiety as might form a due proportion in respect of the same shares or share, and should apply the money to be so raised in or towards renewing such then present or then future lease accordingly; and for the purpose of effecting such renewal, and on accepting a new lease, should, from time to time, surrender

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surrender or join in surrendering (if the same should be thought advisable) the then present or then future lease of the said glebe and tithe, which should for the time being be subsisting, and should execute all such other acts and deeds as should be thought necessary. Subject thereto, the glebe and tithes were to be upon trust for Mrs. *Hodges* for life, and afterwards for Mr. *Hodges* for life, with remainder for their children. Mrs. *Hodges* died in 1850, and there were six children of the marriage.

The leases of the glebe and tithe of *Upleadon*, which were, from time to time, granted by the Dean and Chapter, did not contain any covenant for renewal, but it had been the custom of the Dean and Chapter to grant a fresh lease every seven years, for the term of twenty-one years, upon the surrender of the old lease and payment of a fine. The Plaintiffs accordingly, as trustees, in the year 1850, surrendered the lease which had been granted by the indenture of 1844, and obtained a renewed lease for twenty-one years, to be computed from *Michaelmas*, 1855. This was granted to them by the Dean and Chapter by indenture bearing date the 10th day of *September*, 1851, and this lease was now a subsisting lease and vested in the Plaintiffs. Upon the occasion of such renewal, the Plaintiffs paid a fine of 420*l.* 10*s.* In the year 1857, the Plaintiffs had in their hands, as trustees, a fund which they had retained for the payment of the fine and other expenses in respect of the renewed lease and which they intended to apply in that year. They had realised that sum by retaining, year by year since 1850, a proportion of the rent or annual income arising from the glebe and tithe.

The Ecclesiastical Commissioners, in whom the glebe and tithe were now vested, refused to renew the lease, and

and the trustees, having this sum in their hands, instituted this suit to have the rights of the parties in the lease and in the sum of 707*l.* 1*s.* 9*d.* £3 per Cents., retained for the purposes of the renewal, declared.

Mr. *Hingeston*, for the Plaintiffs the trustees, stated the case.

Mr. *Lloyd* and Mr. *Faber*, for the tenant for life, claimed the accumulated fund. They argued as follows:—The trust is not imperative to renew on any terms, but the trustees are to "use their utmost endeavours to renew upon reasonable terms." The settlement does not contemplate a renewal at all events, but only if the terms demanded be "reasonable," and they would not be justified in renewing on any other terms. They have used their utmost endeavours and have failed, and therefore they cannot by the rents or by mortgage or other disposition raise any fund for a purpose which has wholly failed. There is no imposition of a charge on the tenant for life or remainderman and no act of the trustees could alter their relative rights *inter se*. Therefore the fund in hand belongs to the tenant for life, it being the accumulation of part of the annual rents which belonged to him and which are not required to satisfy any existing trust. This doctrine was acted on in *Tardiff* v. *Robinson* (*a*), in which case the renewal of a crown lease (which had been directed to be renewed) became impracticable, and it was held that those, who, if the lease had been renewed, would have taken it in remainder, had no claim to any portion of the rents and profits which accrued during the existence of the preceding life estate.

The MASTER *of the* ROLLS, referred to the principle of *Howe* v. *Lord Dartmouth* (*b*).

Secondly,

(*a*) *Cited in Colgrave* v. *Manby*, 6 *Madd.* 83, *note* (*l*), *and stated* *post*, p. 629.

(*b*) 7 *Ves.* 137.

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MORRIS v. HODGES.

Secondly, but if the Court should hold otherwise, the tenant for life is only liable to contribute in proportion to the period of his enjoyment.

Thirdly, the costs must come out of the *corpus*.

They cited *Burges* v. *Lamb* (*a*); *Marker* v. *Kekewich* (*b*); *Lord Londesborough* v. *Somerville* (*c*); *Mortimer* v. *Watts* (*d*); *Colegrave* v. *Manby* (*e*); *Playters* v. *Abbott* (*f*); *The Earl of Shaftesbury* v. *The Duke of Marlborough* (*g*); and see *Greenwood* v. *Evans* (*h*); *Mortimer* v. *Watts* (*i*); *Jones* v. *Jones* (*k*); *Reeves* v. *Creswick* (*l*); *Lord Milsington* v. *The Earl Mulgrave* (*m*).

Mr. *R. Palmer* and Mr. *Osborne* for several of the children, and

Mr. *F. Webb*, for two remaining children, argued that the fund in hand represented the estate intended to be purchased with it and was subject to the same trusts. That the fund ought to be retained and the income only paid to the tenant for life. They cited *White* v. *White* (*n*).

The MASTER *of the* ROLLS. My present impression is that but for the case of *Tardiff* v. *Robinson* I ought to ascertain what sum ought to be retained, and direct the income of it to be paid to the tenant for life. I must know something more of the case of *Tardiff* v. *Robinson*.

The

(*a*) 16 *Ves.* 174.
(*b*) 8 *Hare*, 291.
(*c*) 19 *Beav.* 295.
(*d*) 14 *Beav.* 616.
(*e*) 6 *Madd.* 72.
(*f*) 2 *Myl. & K.* 97.
(*g*) 2 *Myl. & K.* 111.
(*h*) 4 *Beav.* 44.
(*i*) 14 *Beav.* 616.
(*k*) 5 *Hare*, 440.
(*l*) 3 *Y. & Col.* (*Exch.*) 715.
(*m*) 3 *Mad.* 491; 5 *Mad.* 471.
(*n*) 4 *Ves.* 24; 5 *Ves.* 554; 9 *Ves.* 554.

The MASTER *of the* ROLLS.

1860.

MORRES v. HODGES. *Jan.* 16.

I think I am bound by the decision of Lord *Eldon* in *Tardiff* v. *Robinson* and that the fund belongs to the tenant for life.

RICHARDSON v. MOORE. TARDIFF v. ROBINSON.

1817. Sir W. GRANT, *M. R.*

1819. Lord ELDON, *Lord Chan.*

THESE two suits were distinct, but they arose out of the same transactions.

In 1766, a crown lease of property in *King Street, St. James*, was, upon the marriage of *John Richardson* the younger, assigned by his father (*John Richardson* the elder) to trustees, in trust, out of the rents, to raise an annuity of 200*l.* a-year and pay it to *John Richardson* the younger, and afterwards to his wife and children successively, and after such annuity should be raised, to permit *John Richardson* to receive the residue of the rents for his own use.

This deed contained a proviso that the trustees should and might from time to time, and at all times thereafter, renew and take a new lease of these premises, and should and might, out of the rents and profits, defray the fines, when and as often as it should be usual or proper to renew. The renewed leases were to be subject to the same trusts.

In 1770, *John Richardson* the elder bequeathed his interest in the leaseholds to his daughter *Ann* (afterwards Countess *Tardiff*).

By the settlement made on her marriage with Count *Tardiff* in 1796, the leasehold, subject to the annuity of 200*l.* a-year, was assigned to trustees, in trust for the Countess *Tardiff* for life, with remainder as she should appoint. This settlement contained a proviso that it should be lawful for the trustees, at the usual and accustomed times, at the request of the Countess *Tardiff* during her coverture, and afterwards at the "discretion and proper authority" of the trustees, to renew or join and concur in renewing the lease, and to raise the fines by mortgage or the rents. The renewed lease was to be subject to the same trusts.

The Countess *Tardiff* died in 1802, having, by her will, appointed the

1817.

RICHARDSON v. MOORE. TARDIFF v. ROBINSON.

the leaseholds subject to the annuity of 200*l.* a-year, and to the payment of two annuities to Mrs. *Gundon* and children and Mrs. *Stevenson* and children, and subject to the powers for raising the money to pay the fines of renewal mentioned in the deed of 1796, in trust to pay the rents to her husband, Count *Tardiff*, and after his death to the *Richardsons*. And she declared, that if, upon any renewal, a fund, which she referred to, and the rents in hand should not be sufficient, the annuities were to be suspended until the trustees, with the rents, should have received sufficient to pay the fines. There was a proviso that if the fine demanded should be excessive or exorbitant, the trustees might decline to renew, and the fund set apart, to the full amount of the fines required, should be invested upon the same trusts as the leaseholds.

The rents of the property were 820*l.*, and the lease, which had been renewed, would expire in *April*, 1829.

Richardson the younger and his children, in *September*, 1815, filed their bill (*Richardson* v. *Moore*) against *Moore* (the trustee), Count *Tardiff* and the annuitants under the will of the Countess *Tardiff*, insisting that the payment of the annuities, and of the surplus rents to Count *Tardiff*, ought to be suspended until a fund should have been provided, by means of the rents and profits, sufficient to obtain a renewal of the present lease, and that all the rents, after paying the Plaintiff his annuity of 200*l.*, ought to be appropriated and set apart until the accumulation of the rent should amount to sufficient to obtain a renewal. It prayed that the payment of the annuities might be suspended, and that the amount of the fund necessary might be ascertained and paid into the bank and applied for that purpose.

The answer of Count *Tardiff* stated, that the property was required by the Crown for improvements in widening the end of *King Street*, and that he was advised, that, under the circumstances aforesaid, no such renewal could be obtained of the lease of the premises as was contemplated by the several settlements or by the will of the Countess *Tardiff*.

The cause of *Richardson* v. *Moore* came on for hearing on the 24th of *May*, 1817, and on the 9th of *June*, 1817,

Sir *William Grant* (M. R.), dismissed the bill without costs (*a*).

This suit of *Tardiff* v. *Robinson* was afterwards, in *February*, 1818, instituted by Count *Tardiff*, against the trustees, the *Robinsons* and

(*a*) *Reg. Lib.* 1816, *B.*, *fol.* 1048.

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and the annuitants under the will of Countess. It contained this allegation:—that the trustees pretend, that they are entitled to retain the rents and profits of the said premises, in order to form a fund for procuring a renewal, but your orator charges, that, by certain acts passed in his present Majesty's reign, regulating the letting of Crown lands, the renewal has become impracticable, and that the Commissioners of the land revenues of the Crown have absolutely refused to grant any further term upon any conditions whatever. It stated the suit of *Richardson* v. *Moore*, and that upon its coming on for hearing, "it appearing that no renewal could be obtained the bill was dismissed."

The bill prayed an account of the rents of the leasehold premises received by *Moore* (the surviving trustee) and for payment of what might be found due.

The executors of *Moore*, (who died during the suit,) said, that the crown had refused to renew, and they submitted whether the Plaintiff was entitled to the surplus rents, or whether they ought to set apart all or any part of the surplus rents, for the purpose of forming a fund, as in case of a renewal of the leasehold premises, to meet the payment of the said annuity of 200*l.* a year after the expiration of the said lease, had been practicable or could have been obtained, or in what manner the Defendants were bound to apply the surplus rents.

At the hearing in 1819, Lord *Eldon* "declared, that as no renewal could be obtained, no accumulation of the rents and profits of the estates in question (*a*) take place, in pursuance of the provisions of the settlement of the 16th of *July*, 1796, and the will of Lady *Tardiff*, the Plaintiff is entitled to the surplus of the rents and profits of the said estates," for so much of the residue of the term as he should live, after payment of the three several annuities of 200*l.*, 100*l.* 100*l.* charged upon the said estates by the said settlement and will (*b*).

(*a*) *Sic.* (*b*) 1818. *Reg. Lib., fol.* 500.

ELTON v. ELTON. (No. 1.)

Feb. 11.

Many persons being interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his own expense.

Where the parties are equally interested, the practice is to give the custody of the deeds to the Plaintiff, but where they are not, then they are usually given to the person having the greatest interest.

Subsequent costs, in a partition suit, ordered to be borne by the parties according to the value of their respective shares.

THIS was a suit for partition, and the commission having been executed, the cause came on for further consideration. A great number of persons were interested, and the estate was partitioned into a number of shares, some of which were very small.

There were no title deeds of any importance, and the question was, as to the custody of the deed of partition, and subject to what restrictions it was to be held. And, secondly, as to the costs of the hearing.

Mr. *Follett* and Mr. *A. Smith*, argued, that the Plaintiff ought to have possession of the deed, the trustees entering into a covenant to produce them, and that all parties interested might have counterparts at their own expense.

Mr. *Shapter* and Mr. *T. Hughes* suggested, that the deed had better be enrolled.

Mr. *Batten* argued, first, that his clients to whom one-fourth of the estate had been allotted jointly, who had the largest interest in the property, and who were willing to covenant to produce the partition deed, had the best right to its custody.

Secondly, that no costs ought to be given of the present hearing. That such was the practice up to the original hearing, and, as to the subsequent costs, appeared to have been the course pursued in *Agar* v. *Holdsworth* (*a*), where it was ordered that "the expenses

(*a*) *Seton on Decrees* (2nd ed.), 314.

penses of the commission of partition, of issuing it, executing it and confirming the commissioners' certificate be borne by the Plaintiffs and Defendants according to the value of "their respective shares."

Mr. *Lloyd* and Mr. *Crofts* argued, that no party interested in the estate had any greater right than another to the possession of the deed, that it did not depend on the extent of interest, and that the expense of duplicates ought to be borne by the person retaining possession of the deed, or by the parties generally as part of the costs in the cause.

Mr. *Bagshawe*, Mr. *Busk*, Mr. *Phillips* and Mr. *Frederick Harrison* for other parties. *Agar* v. *Fairfax* (*a*); *Todd* v. *Downes* (*b*) and *Jones* v. *Robinson* (*c*), were also referred to.

The MASTER *of the* ROLLS, after referring to the difficulty which, if a covenant for production were entered into by trustees, would occur on the death of all of them, and on every appointment of new ones, said:—

I am of opinion that Mr. *Batten's* client ought to have the custody of the deeds, and that the partition deed should be enrolled at the expense of all parties. The great difficulty in preserving the deed will be thus avoided, for if the original be lost the parties will always be able to obtain a copy.

As to the right to the custody of the deeds in this case, I admit there is no principle of law on the subject. The practice is, if all parties are equally interested, to give the custody to the Plaintiff; but if they are not, then

(*a*) 17 *Ves.* 533.
(*b*) *Seton on Decrees* (*2nd ed.*), 314.
(*c*) 3 *De G., M. & G.* 910.

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then they are usually given to the person who has the largest interest in it.

The deed must be enrolled and any party interested must be at liberty to have a duplicate of it at his own expense.

As to the costs, I think all the costs of this hearing must be borne by the Plaintiffs and Defendants according to the value of their respective shares.

ELTON v. ELTON. (No. 2.)

Feb. 11.

A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts. *Held*, that a power of sale might be introduced into a settlement of subsequently acquired real estate.

THE settlement of Mr. and Mrs. *Buxton* comprised personal estate only, but it contained a power to the trustees to alter and vary the investments and a covenant to settle, on similar trusts, future acquired real and personal estate.

This was a partition suit and a share of a real estate, apportioned under the partition, became subject to this covenant to settle.

Mr. *Lloyd* and Mr. *Crofts*, for Sir *Archer D. Croft*, the surviving trustee of the settlement, asked that it might be conveyed to him on the trusts of the settlement, and that a power of sale might be vested in him. They relied on *Sugd. Pow.* (*a*), and *Williams* v. *Carter* (*b*), and they suggested, that such a power, as to real estate, was analogous to the power to alter and vary as applied to personal estate.

The MASTER *of the* ROLLS.

I think that seems to be right.

(*a*) *Vol.* 2, *p.* 485 (*6th ed.*) *Vol.* 2, *p.* 635.
(*b*) *Sug. Pow. App., No.* 23,

FRANKS *v.* BROOKER.

Jan. 24, 25.

A testator referred to his five daughters as the wives of five persons he named, and he gave life interests in separate legacies to his five daughters, and afterwards to their respective husbands. *Held*, that the latter gift was confined to their then existing husbands.

THE testator, by his will dated in 1824, directed his three trustees, after the decease of his widow, to lay out and invest in the joint names of his trustees, and of each of his five several daughters therein named, the sum of 500*l.* The testator's will then proceeded as follows:—"In the joint names of my said trustees and my daughter *Anne, now the wife of Robert King*, the sum of 500*l.* of like lawful money; also in the joint names of my said trustees and *my daughter Elizabeth, now the wife of Thomas Bray*, the sum of 500*l.* of like lawful money; also in the like names of my said trustees, and my daughter *Sarah*, now the wife of *John Budgeon*, the sum of 500*l.* of like lawful money; also in the like names of my said trustees and my daughter *Mary*, now the wife of *William Stacey*, the like sum of 500*l.* of like lawful money; also in the joint names of my said trustees and my daughter *Amy*, now the wife of *Thomas Searles*, the like sum of 500*l.* of like lawful money; and that my said trustees do and shall stand and be possessed of the said five several sums of 500*l.* each, and the dividends, interest and produce to arise therefrom respectively, upon trust, from time to time, to pay and apply the said interest, dividends and annual produce of the said several sums respectively unto each of my said several daughters, or otherwise to authorize and empower each of my said daughters, and their respective assigns, to receive and take the same to and for her and their own sole and separate use respectively, for and during the term of the natural life of such daughters respectively, independent and exclusive of

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her and their respective husband and husbands, who is or are not to intermeddle therewith, nor is or are the same, or any part thereof respectively, to be subject or liable to his or their or any of their respective debts, control, interference or engagements; and the receipt and receipts of my said daughters respectively, for the dividends, interest and annual produce of each of their respective sums of 500*l.* in the said Bank Annuities, or any part thereof, subscribed with her own hand, shall, whether covert or sole, and nothwithstanding her coverture, be a sufficient discharge for so much thereof as shall be therein acknowledged or expressed to be by her respectively received. And after the decease of each or any of my said daughters respectively, during the lifetime of her or their several or respective husbands, leaving issue her or them surviving, then in trust to pay and apply the dividends, interest and proceeds of the said several sums of 500*l.* so standing in the joint names of them my said trustees, and the names of such daughter or daughters respectively so dying in the lifetime of her or their respective husbands, *unto such husband or husbands for the term of his or their natural life or lives,* or until he or they respectively shall commit any act or acts of bankruptcy within the meaning of the statutes relating to bankrupts, whereon a commission shall issue, or he or they shall be found or declared a bankrupt or bankrupts, or until he or they shall make any composition or compositions with his or their creditors for the payment of his or their debts, although a commission or commissions of bankruptcy shall not issue against him or them respectively, or until he or they shall become insolvent, or make an assignment of his or their effects for the benefit of his or their creditors respectively, which shall first happen. And from and after the decease of the several

several husbands of each of my said daughters respectively, or the committing any act of bankruptcy by them or either of them as aforesaid, or being found or declared bankrupt, or making any such composition or assignment, or becoming insolvent as aforesaid, then upon trust that they, my said trustees, shall stand and be possessed of the dividends, interest and produce of each of the said several sums of 500*l.*, in trust for the use of the child, if only one, or, if more than one, all and every the children of each of my said daughters respectively, whensoever born, and either *by the present or any future husband* respectively, equally to be divided between the same children of my said daughters respectively, if more than one, share and share alike, as tenants in common." And after directions as to vesting and accruer, the will proceeded thus:—And further, in case of the death of any or either of my said daughters respectively without issue living at the time of their or her decease, then that my said trustees shall stand and be possessed of the said several sums or sum of 500*l.* so standing in the joint names of my said trustees, and such daughters or daughter so respectively dying without issue, them or her surviving, to the use of such person or persons as such daughter or daughters respectively shall, notwithstanding coverture, by their or her last will and testament respectively, or any writing in the nature of or purporting to be their or her last will and testament, to be signed and executed in the presence of and attested by two or more credible witnesses, give and bequeath the same after the death of their respective husbands. And in default of any such gift or bequest, &c., *to the use of the husband or husbands of any such daughter or daughters* respectively, so dying without issue as aforesaid, or their or his legal personal representative respectively.

 The

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FRANKS v. BROOKER.

The testator died in 1825, and his widow in 1836.

Thomas Bray, the husband of the testator's daughter *Elizabeth*, died in 1845, and his widow married the Plaintiff Mr. *Franks* in 1850. She died in 1856, leaving the Plaintiff and some children of her first marriage surviving.

Mr. *Franks* instituted this suit against the surviving trustee and executor and the children, insisting that he was entitled for life to the dividends of the 500*l.* bequeathed to his late wife, her husband and children.

Mr. *Lloyd* and Mr. *Villiers*, for the Plaintiff.

Mr. *Hardy*, for the trustee.

Mr. *R. Palmer* and Mr. *C. Hall*, for the children. *Woodmeston* v. *Walker* (*a*); *In the Matter of Bryan's Trust* (*b*) were cited.

The MASTER *of the* ROLLS.

Jan. 25. On reading this will, I have come to the conclusion that the testator meant the husbands of his daughters then living, and my reason is:—that the testator has mentioned all the husbands by name, and that when he intended to refer to future husbands, he has expressed it, as in the gift to their children, "either by the present or any future husband." This view is also confirmed

(*a*) 2 *Russ. & Myl.* 197. (*b*) 2 *Sim.* (*N. S.*) 103.

confirmed by the ultimate gift to the legal personal representatives of the husbands, for it cannot be supposed that he intended a share to be divided between the legal representatives of the two husbands of a deceased daughter.

I think that the real meaning was, to confine the life interests to the then existing husbands.

MOORE *v.* CULVERHOUSE.

Jan. 28, 31.

An unregistered equitable charge on the equity of redemption of a property in *Middlesex* postponed to a subsequent registered mortgage of it.

THE question discussed, in this case, was as to the priority of two mortgages of property in the county of *Middlesex*.

Henry Coney, the owner of some property at *Finchley*, in the county of *Middlesex*, called the *Queen's Head*, first mortgaged it for 1,000*l.*, by an indenture dated the 19th of *December*, 1857; but no question arose as to this mortgage.

He next charged it in favor of the Defendants, Messrs. *Reid*, by a memorandum dated the 1st of *June*, 1858, which was in the following words:—

"To Messrs. *Futvoye, Sawtell & Lightfoot*,—Gentlemen,—I request you to hold the deeds relating to the *New Queen's Head, Finchley*, after payment of your client's mortgage of 1,000*l.* and interest secured thereon, in favor of Messrs. *Reid* & Co., of *Liquorpond Street*, to secure them as second mortgagees the sum of 120*l.*, this

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this day lent by them to me, with interest at 5*l.* per cent. Dated 1st of *June*, 1858.

"*Henry Coney.*"

This memorandum had never been registered.

Afterwards, by an indenture dated the 24th of *July*, 1858, and made between *Henry Coney* of the one part, and the Plaintiff *John A. Moore* of the other part, in consideration of 308*l.* due to the Plaintiff, *Henry Coney* granted the same property unto the Plaintiff, &c., subject to the indenture of mortgage dated the 19th of *December*, 1857, for securing 1,000*l.* and interest, and subject also to a proviso for redemption, on payment of the 308*l.*

A proper memorial of this indenture was duly registered by the Plaintiff in the registry of the county of *Middlesex*, on the 4th of *August*, 1858.

The Plaintiff instituted the present suit for a foreclosure and redemption, and thereby claiming priority over the security of Messrs. *Reid* & Co. He alleged that he had no notice of their security until long after the date and registry of the deed of the 24th of *July*, 1858.

Mr. *R. Palmer* and Mr. *Jessel*, for the Plaintiff, argued that the Messrs. *Reid's* security must be postponed to the Plaintiff's for want of registration under the 7 *Anne*, c. 20.

Mr. *Knox Wigram*, for Messrs. *Reid* & Co., argued, first, that the Plaintiff, at the date of his mortgage, had notice,

notice, actual or constructive, of the prior mortgage to Messrs. *Reid*, and that they therefore took subject to it. On this point, *Whitbread* v. *Jordan* (*a*); *Worthington* v. *Morgan* (*b*); *Jones* v. *Smith* (*c*); *Evans* v. *Bicknell* (*d*); *Barnhart* v. *Greenshields* (*e*); *Ford* v. *White* (*f*), were cited.

Secondly, that a memorandum like that of the 1st of *June*, 1858, was not within the act of 7 *Anne*, c. 20, and did not require registration, as had been decided in *Wright* v. *Stanfield* (*g*).

Mr. *Lloyd*, Mr. *Selwyn*, Mr. *Webb* and Mr. *Martindale*, for other parties.

Mr. *R. Palmer* in reply.

This case differs from *Wright* v. *Stansfield*, where the contract was merely executory, the mortgagor having agreed, at a future time, to execute an assignment, and which assignment, therefore, it was impossible to register until it had been completed. Here there is an equitable assignment, which vested the equitable interest in Messrs. *Reid*. It was an executed contract, and a complete equitable assignment of the existing interest of *Coney*, and nothing more remained to be done by him. It comes, therefore, within the mischief referred to in the recital of the act, and could and ought to have been registered as an equitable conveyance.

The

(*a*) 1 *Y. & C.* (*Exch.*) 303.
(*b*) 16 *Sim.* 547.
(*c*) 1 *Hare*, 43.
(*d*) 6 *Ves.* 173.
(*e*) 9 *Moore, P. C.* 32.
(*f*) 16 *Beav.* 120.
(*g*) 27 *Beav.* 8.

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Jan. 31.

The MASTER *of the* ROLLS (after deciding that the Plaintiff had not notice) proceeded as follows:—

The next question is, whether, under the statute of *Anne*, this was an incumbrance which required registration. On the construction of the act, I think that my former decision is explainable. It is a remedial act, and meant to extend the benefit of registration as far as possible. The title and preamble of the act shew that it was intended to extend to all cases of incumbrances "that may affect" any hereditaments in *Middlesex*. I am of opinion that the word "conveyance" applies to equitable as well as to legal incumbrances, and that this is within the act. The Plaintiff is therefore entitled to priority over Messrs. *Reid*.

In re WOLLASTON'S SETTLEMENT.

Jan. 30.

A fund was settled on trust for the wife for life, and in case she should leave any issue living at her death, for the husband for life, and after his decease, upon trust to divide it amongst the children of the marriage "that should be *then* living on their respectively attaining the age of twenty-one years." And in case there should be no child, or of their all dying in the wife's life, to pay the fund to such person as the wife should by will appoint, and in default to the executors or administrators of the husband and wife or the survivor of them. And in case the wife should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living. *Held*, that the limitation to the children remained contingent until the death of their father.

BY articles made in 1806 on the marriage of *Thomas Acton Wollaston* with *Mary Morris*, her father covenanted that his executors would pay 2,000*l.* to trustees, upon trust to pay the interest or dividends thereof to *Mary Wollaston* for her life for her separate use, and after the decease of *Mary Wollaston*, in case she should leave any issue of her body living at her death, then upon trust to pay to *Thomas Acton Wollaston* the interest or dividends of the 2,000*l.* for his life, and after his decease then upon further trust that the

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the trustees, or the survivor of them, his executors or administrators, should distribute and divide the principal sum of 2,000*l.*, and all interest or dividends that should be then due, unto or amongst the child or children of *Mary Wollaston* by *Thomas Acton Wollaston* begotten *that should be then living*, share and share alike, on their respectively attaining the age of twenty-one years, and if but one such child, then to pay the whole unto such only child at that age, and the interest and dividends to be applied for the maintenance, education and support of such child or children in the meantime.

And in case there should be no child or children of the then intended marriage, or, being such, all of them should happen to die in the lifetime of *Mary Wollaston*, then upon trust to pay the sum of 2,000*l.* to such person or persons as *Mary Wollaston* should, by her will, appoint, and in default of such appointment to pay the same to the executors or administrators of *John Morris* and *Mary* his wife, or the survivor of them. And in case *Mary Wollaston* should survive her intended husband, without leaving issue then living, to pay the whole of the 2,000*l.* to *Mary Wollaston* for her own use.

Mary Wollaston died in 1857, without having exercised the power of appointment. She had five children, all of whom attained twenty-one; but two of them (viz. *Elizabeth* and *Caroline*) predeceased her.

This was a petition presented by two of the surviving children (*Thomas* and *John*), insisting that, according to the true construction of the settlement, in the events which had happened, the fund had become absolutely vested in the three surviving children, in equal shares, subject to the life interest of their father, who was willing

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willing that the shares of the Petitioners should be at once paid to them, and had agreed to give up his life interest to the extent of such shares, in order that such payment might be made. The petition prayed payment accordingly.

Mr. *Jolliffe* for the Petitioners, two of the three surviving children.

Mr. *C. C. Barber* for the third surviving child.

Mr. *Dean* for the father and representatives of the two deceased children.

It was argued, first, that all the children who attained twenty-one participated in the fund; secondly, that those only took who survived the mother; and, thirdly, that the gift to the children was contingent until the death of both parents. The cases of *Emperor* v. *Rolfe* (*a*); *Torres* v. *Franco* (*b*); *Swallow* v. *Binns* (*c*), were cited.

The MASTER *of the* ROLLS.

I have no doubt as to the proper construction to be put on the settlement.

The wife was to take a life interest, and in case she left any issue living at her death, her husband was also to take for his life, and after his decease the property was to be divided among the children "that should be then living." This is very distinct and clear; the children alone were to take who should survive the husband who had already survived the wife.

I am

(*a*) 1 *Ves. sen.* 208.
(*b*) 1 *Russ. & Myl.* 649.
(*c*) 1 *Kay & J.* 417.

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I am told that this is inconsistent with what is afterwards provided for in a different state of circumstances, viz. the case of the wife dying leaving no children, in which case she is to have a testamentary power of appointment, if dying in the life of her husband; and if she should survive him, the fund was to be paid over to her for her own use. I see no inconsistency, although in a possible event the fund may not be disposed of.

This case is quite different from *Howgrave* v. *Cartier* (*a*), where the settlement was ambiguous and the clauses inconsistent, and this enabled the Court to modify the expressions, and to hold that the meaning of the parties was, to benefit all the children who attained twenty-one.

Three children only have survived their mother, their father takes a life interest, and the gift to the children will remain contingent until his death.

All I can do is to order payment of the dividends to the father, with liberty to apply at his death.

(*a*) 3 *Ves. & B.* 79.

LLOYD *v.* COCKER.

Feb. 20.

A power of advancement for putting or placing the issue of the marriage "to any profession, trade or business, or for their advancement in life," *Held* to authorize the payment of part of the trust funds to a daughter on her marriage.

BY the settlement made on the marriage of Mr. and Mrs. *Lloyd* in 1827, some funds were settled on the wife for life, with remainder to the husband for life, with remainder to the children, with gifts over to other persons.

It

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It had been held by this Court, that the interests of the children were defeasible in case of their deaths in the life of the survivor of their parents (*a*).

The settlement contained the following provision for the advancement of the children :—

And it is hereby declared and agreed, by and between the parties hereto, that it shall and may be lawful to and for them, the said trustees (in case there shall be issue of the intended marriage), at anytime during the joint lives of *Augusta Adams* and *Vaughan Lloyd*, her intended husband, with the consent and approbation of *Augusta Adams* and *Vaughan Lloyd*, her intended husband, or during the life of the survivor of them with his or her consent, and after the decease of the survivor of them, *Augusta Adams* and *Vaughan Lloyd*, of the trustees own authority, to raise any sum or sums of money, not exceeding the sum of 2,000*l.* in the whole, of the said hereby assigned moneys, or any part of the same, *for the putting or placing such issue, any or either of them, to any profession, trade or business, or for their advancement in life*, as to them, *Augusta Adams* and *Vaughan Lloyd*, her intended husband, or the survivor of them, or the trustees, shall seem advisable, so that the sum so raised and advanced, as aforesaid, shall not and do not exceed the original portion or portions hereby provided for such child or children. And further, if *Augusta Adams* and *Vaughan Lloyd* shall, in their lifetimes, or in the life of the survivor of them, or the trustees after their decease, give or advance, or order and direct to be given and advanced, any sum or sums of money to any child or children for the purpose of placing or putting him, her or them out to any trade, profession or business (*b*), then such child or children, "for whose benefit

(*a*) *See Lloyd* v. *Cocker*, 19 *Beav.* 140.

(*b*) The words "or for their advancement" were here omitted.

benefit such sum or sums of money shall be advanced as aforesaid, shall only be entitled to receive so much more money, as with the said sum so advanced, shall make up his, her or their original portions or fortunes hereinbefore mentioned and provided for him, her or them."

Mrs. *Lloyd* died in 1828, and there was issue of the marriage one child only, viz. *Frances Louisa Lloyd*, who attained twenty-one in 1849.

Frances Louisa Lloyd was about to be married, and she and her father applied to the trustees to raise and pay to her, under the power of advancement contained in the indenture of settlement, the sum of 2,000*l.* *for her advancement in life on her marriage*, but the trustees declined to make such advance, on the ground that the power did not authorize them so to do.

Under these circumstances, a special case was prepared, proposing the following questions for the opinion of the Court:—1. Whether, under the circumstances hereinbefore stated, the trustees of the settlement were, with the consent of Mr. *Lloyd*, authorized to raise, out of the funds now subject to the trusts of the settlement, a sum of 2,000*l.*, for the advancement in life of the Plaintiff *Frances Louisa Lloyd* on her said intended marriage. 2. As to the costs.

Mr. *R. Palmer* and Mr. *Waller*, for Mr. and Miss *Lloyd*, argued that a portion to a daughter, on her marriage, was an advancement within the meaning of the settlement.

Mr. *Follett* and Mr. *H. Wright*, for the trustees and the persons entitled in remainder, argued that the purposes

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poses for which an advancement was authorized must be something, in its nature, analogous to those previously mentioned, viz. relating to a profession, trade or business, and that the mere gift of a capital sum, not intended to be so employed, was not within the proviso.

They also argued, that this construction was aided by the circumstance, that in the latter part of the clause, the word "advancement" was omitted, so that a marriage portion would not be liable to be brought into hotchpot.

As to the costs, *Blinston* v. *Warburton* (*a*), was cited.

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This is a very ill-penned instrument, but I am unable to understand what can be meant by the words, "for their advancement in life," unless it be something additional to and beyond placing the issue out to a "profession, trade or business." What then can be meant by an "advancement in life," which is not putting them out to a "profession, trade or business?" It is difficult to conceive any occasion on which it can arise, except by marriage. I think, that by the introduction of the disjunctive "or," something different is meant from a profession, trade or business, and as applied to daughters, the only other occasion for an advancement in life is their marriage. It is a common expression to say, that a sum was given to a daughter by way of advancement on her marriage. I can give no other rational sense to it.

The subsequent omission of the word "maintenance" does

(*a*) 2 *K. & J.* 400.

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does not cut down the effect of the prior words. It is but an ineffectual attempt to reiterate what had gone before.

I must, therefore, answer the case in the affirmative. As to the costs, as the settlement gives no authority to raise the costs, I think they ought to be paid out of the 2,000*l.*

THOMPSON *v.* CORBY.

Feb. 21, 24.

A gift of a legacy to be divided "between twenty aged widows and spinsters of the parish of *P*——" is a good charitable gift.

THE testatrix appointed two executors, and then directed them to pay her sister, during her life, "the interest of 1,600*l.*, now standing in the Three-and-a-Quarter per Cent. Consols." At her sister's death, the testatrix gave two sums of 600*l.* and 400*l.* "of the aforesaid capital of 1,600*l.*" to some legatees, and proceeded in these words:—

"And I give the interest of the remaining six hundred of the aforesaid sixteen hundred pounds to be divided equally, twice in the year, between *twenty aged widows and spinsters* of the parish of *Peterborough*."

The question was, whether this was a good charitable bequest.

Mr. *Lloyd* and Mr. *George Simpson* for the Plaintiff.

Mr. *Higgins* for the residuary legatee. This bequest is void as a gift to charity; it is neither a gift for any purpose of general public utility nor for the relief of poverty. As the bequest is not limited to the *poor* widows and spinsters of the parish, the executors may select, as objects, any twenty widows and spinsters in the parish, without regard to their circumstances, and in this

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this there would be nothing charitable. The object is one merely of benevolence and liberality, which it has been held cannot be supported as a charitable legacy; *Morice* v. *The Bishop of Durham* (*a*).

Again, this is not one of the objects specified in the statute of Charitable Uses (43 *Eliz.* c. 4). It is not a gift "for the relief of aged and impotent and poor people," for the words "relief" and "poor" are both omitted. "A gift to the aged of such a parish is not a charity within the statute, unless it expresses that they are also the poor, for *non constat* they may not be rich;" *Attorney-General* v. *The Haberdashers' Company* (*b*). Orphans are mentioned in the statute, but widows are not. Secondly, the gift is of Three-and-a-Quarter per Cent. Consols, and there is no such stock; *Evans* v. *Tripp* (*c*).

Mr. *Wickens* referred to *Attorney-General* v. *Coombe* (*d*) where a bequest to the widows and orphans of the parish of *L*—— was held to be a good charitable bequest. He was stopped by the Court.

The MASTER *of the* ROLLS.

If the matter had depended on the statute alone, I should have thought that the word "aged" would have been sufficient to create a good charitable bequest; but the case of *Attorney-General* v. *Coombe* determines that a bequest to the widows and orphans of a parish necessarily implies that it is for such as are suffering from destitution or privation.

(*a*) 9 *Ves.* 399.
(*b*) 1 *Myl. & K.* p. 428, *referring to Duke on Charitable Uses*, 125.
(*c*) 6 *Madd.* 91.
(*d*) 2 *Sim. & St.* 93.

NOTE.—See the cases referred to in 2 *Keen*, p. 12.

THE GOVERNORS OF THE CHARITY FOR THE RELIEF OF POOR WIDOWS AND CHILDREN OF CLERGYMEN

v.

ROBERT SUTTON and Others (Trustees of the *Stock Exchange*).

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Dec. 2, 3.
1860.
Jan. 16.

Construction of "The Charitable Trusts Act, 1853" (16 & 17 *Vict.* c. 137) as regards the word "endowment" employed in the 62nd section as contradistinguished from the expression "voluntary contributions."

The word "endowment," in the 62nd section of the 16 & 17 *Vict.* c. 137, has reference to an endowment made for some specific or particular purpose or trust.

The investment by a charity of its voluntary contributions in land or other permanent security cannot convert it into an "endowment."

Where land had, in 1682, been purchased by a charity and paid for out of the general funds voluntarily contributed to its support: *Held*, that it was not an "endowment" within the Charitable Trusts Acts, so as to require the consent of the Charity Commissioners to a sale of it.

THIS was a special case stated for the opinion of the Court under the 13th and 14th *Vict.* c. 35, upon the following statement:—

By letters-patent granted by King *Charles* the 2nd, and dated the 1st of *July*, 1678, after reciting that his Majesty was informed, by the humble petition of divers of his loving subjects who were sons of clergymen, that several charitable and well-disposed persons, the children of clergymen and others, had appeared very free and forward in contributing to the relief and maintenance of such of the widows and children of loyal and orthodox clergymen as were poor and indigent, which had been to good effect in placing out many of the said poor children apprentices, and towards the maintenance of others at the University, and to the relief of many of the said poor widows; and reciting that his Majesty was informed and well assured, that if he would be graciously pleased to erect and settle a corporation for the receiving, managing and disposing of the said charity, they should not only be encouraged to continue

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continue and enlarge such their contributions, but divers others would be likewise induced to extend the like charity to the uses aforesaid, his Majesty willed, ordained, constituted, declared and granted that *Francis* Earl of *Longford*, then Lord Bishop of *Rochester*, and certain other persons named therein and their successors, to be elected and chosen in the manner thereinafter expressed, should, from time to time, for ever thereafter, be and by virtue of the now stating letters-patent should be one body politic and corporate, in deed and in manner, by the name of "*The Governors of the Charity for Relief of the Poor Widows and Children of Clergymen*," and have perpetual succession, and that they might be capable to purchase, have, take, receive and enjoy lands, &c., and other hereditaments not exceeding the yearly value of 2,000*l.*, and also all manner of goods, chattels and things whatsoever, of what name nature or quality soever they might be. And also to give, grant, set, let, demise, alien and assign, and dispose of the same lands, &c.

The court of assistants was to have the whole government, management and direction of the affairs and business of the corporation. The court of assistants were to have power to determine, ordain and make any ordinances, &c. &c. touching or concerning the good estate, rule, order and government of the corporation, as well in all matters and causes touching or concerning the said corporation as also the electing of officers, and disposing, ordering and managing of the lands, moneys, revenues and profits that should be given to or acquired by the corporation.

Further licences to hold lands in mortmain were granted to the corporation on the 6th of *December*, 1714, the

the 6th of *February*, 1810, and the 20th of *December*, 1810.

"The governors had, ever since the grant of the letters-patent, acted in the execution of the charitable purposes for which the corporation was formed. During the earlier period of its existence, the funds of the corporation arose entirely from voluntary donations and subscriptions. The governors were now the owners of extensive landed estates in various parts of *England*, arising either (1) from conveyances made to them for the general purposes of the charity, (2) from devises made to them before the act 9 *George* II. c. 36, for the general purposes of the charity, or (3) from purchases, from time to time, made by them out of the general funds of the corporation in their hands. These general funds were the produce of voluntary subscriptions, donations or bequests, or of collections which used formerly to be, from time to time, made for the benefit of the charity, or represented accumulations of the income arising from the fixed property of the charity. The charity had frequently received and still frequently received legacies, and had a subscription list for donations and subscriptions, and considerable sums, arising from these sources, had, from time to time, been, and still, from time to time, were carried over to the general funds of the charity."

The governors had also, from time to time, accepted gifts or grants, for special charitable purposes distinct from the general purposes and objects of the corporation; but no question with regard to any property so situate arose in the present case.

In the latter part of the year 1682, the corporation contracted for the purchase of an estate in *Capel Court*,

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Bartholomew Lane, in the city of *London*, for the sum of 2,832*l.* 5*s.* The following extract from a resolution come to at a court of assistants held 28th *March*, 1683, (taken from the books of the corporation) will shew the nature of the transaction:—The deeds of purchase of the estate in *Capel Court*, *Bartholomew Lane*, in the names of *Thomas Langham*, *George Torriano*, esqrs., and *Thomas Bedford*, gent., the present treasurers of this corporation, and *Roger Jacson*, late treasurer, were brought in, which deeds being perused were approved of, and the thanks of the court given to the managers of the said purchase. And it was ordered, that the said four trustees and their heirs (performing the trusts reposed in them) should be saved harmless by reason of the using their names in the said purchase. And Mr. *Bedford* gave in an account that he had paid, as stock of this corporation, towards the said purchase, 432*l.* 5*s.*, although he had not so much in his hands, and that 2,400*l.* (being the rest of the purchase-money) had been borrowed of the several persons mentioned in the schedule annexed to the deed of the purchase. And the court ordered, that all care should be taken for payment of the aforesaid debt of 2,400*l.*, and interest thereof, accordingly, and that as the treasurers for the time being should have any considerable sum in their hands, they should endeavour to pay off some of the said debt and not only take in Mr. *Bedford's* certificates to be cancelled, but also to take such releases and discharges as counsel should advise."

The deeds mentioned in the resolution were deeds of lease and release, dated respectively the 21st and 22nd of *March*, 1682 (old style) conveying the property to *Langham* and others as trustees for the corporation. "*Habendum* upon this special trust and confidents, and to the intent and purpose, that they should, in the first place, by

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by sale, mortgage or out of the rents raise and pay the several debts and sums of money mentioned in the schedule annexed thereto unto persons therein mentioned, and subject thereto, to stand seised of the property in trust for and for the benefit of the governors of the charity for relief of poor widows and children of clergymen and their successors, and shall and may from time to time convey and dispose of the same accordingly." To this indenture a schedule was annexed, containing the names of twelve persons by whom money had been advanced for the purchase, and the amount so advanced by each of them.

Subsequently and before the 26th of *March*, 1684, six of the persons mentioned in this schedule were paid, and the others accepted bonds of the corporation for the amounts due to them, and consented to release the property from their claims. And by an indenture dated the 26th of *March*, 1684, and made between the persons who, together with the four trustees, had lent the 2,400*l.* of the second part, and the governors of the charity for the relief of poor widows and children of clergymen of the third part, the estate in question was conveyed to the corporation in fee simple, discharged from any claim of the parties thereto of the first and second parts, or any of them.

No special trust whatever was declared by either of the indentures of the land so conveyed to the corporation.

"As no accounts of the charity funds, during the first years of its existence, could be discovered, if, in fact, any such accounts were kept, it did not distinctly appear from what sources the moneys borrowed for the said estate were repaid. How such repayment was effected

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effected could only be gathered by way of inference from the general course of proceedings, as shewn by the minute books of the court of assistants of the corporation," which extended from the origin of the corporation down to *October*, 1708, which it was agreed should form part of this case.

The estate continued in the possession of the corporation without interruption, from that time until now, and the income arising from it had always been applied to the general purposes of the charity.

By an indenture dated the 29th of *November*, 1825, the corporation demised the property to the trustees of the *Stock Exchange* for sixty-one years, at a rent of 450*l.*

By an agreement, dated the 19th of *February*, 1859, and made between the Plaintiffs, the corporation of the first part, and the Defendants, the trustees of the *Stock Exchange* of the second part, the Plaintiffs agreed to sell, and the trustees of the *Stock Exchange* agreed to purchase, the fee simple of the hereditaments and premises demised by the lease for 30,000*l.*

The Defendants did not object to the Plaintiffs' title; but they alleged, that the governors were unable to make any valid sale of the land in question, without the previous approval of the Charity Commissioners for *England* and *Wales*, acting under the powers of the Charitable Trusts Act, 1853, and the Charitable Trusts Amendment Act, 1855, and that they were, in fact, expressly restricted from doing so by the 29th section of the last act.

The Plaintiffs contended, that their right to deal with and

and convey the lands in question to the Defendants was in no degree affected by these acts, and they insisted, that the Defendants were bound specifically to perform the contract on their part, without requiring any approval of the Charity Commissioners to be obtained for that purpose.

The question for the opinion of the Court was this:—

"Whether the approval of the Charity Commissioners for *England* and *Wales* is necessary to enable the Plaintiffs to make a good title to and a valid conveyance of the lands so contracted to be sold by them to the Defendants."

The Charitable Trusts Act, 1853 (*a*), under which the Charity Commissioners were appointed, with extensive powers over the property belonging to charities, exempts from its operation (s. 62), the Universities, &c. &c., and proceeds thus:—"Nor shall this act extend or be applied to the Commissioners of Queen *Anne's* Bounty, or to the *British Museum*, or to any friendly or benefit society or savings bank, or any institution, establishment or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, *wholly maintained by voluntary contributions*, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by *voluntary subscriptions* and partly by *income* arising from any *endowment*, the powers and provisions of the act shall, with respect to such charity, extend and apply to the income from endowment only, to

(*a*) 16 & 17 *Vict. c.* 137.

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to the exclusion of voluntary subscriptions, and the application thereof; and no *donation* or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income, in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this act, and no portion of any such donation or bequest, as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this act."

By the 66th section, which gives the interpretation of terms, it is provided, that "the expression '*endowment*' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments and personal estate whatsoever, which shall, for the time being, belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof."

"The Charitable Trusts Amendment Act" (*a*) by the 29th section provides as follows:—"It shall not be lawful

(*a*) 18 & 19 *Vict. c.* 124.

lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of parliament, under any act already passed, or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage or charge of the charity estate, or any lease," &c.

By the 48th section of "The Charitable Trusts Amendment Act" (*a*) it is provided, that—"In the construction of the principal act and this act the word '*charity*' shall include every institution in *England* or *Wales* endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the act of 1853."

Mr. *R. Palmer* and Mr. *Wickens* for the corporation. The assent of the Charity Commissioners is not necessary. This is a society supported by voluntary contributions, which has, from time to time, put by part of its funds, in order to meet the requirements of a future day. Consistently with the charter it might, at any time, be applied as income. The investment of voluntary contributions does not alter their character; if this money had been put aside in a drawer or invested in Exchequer bills or in the funds, its nature would have remained the same, it would still be voluntary contributions; if so, the investment of contributions in land would not change them into "an endowment."

Mr. *Lloyd* and Mr. *Waley* for the trustees of the *Stock Exchange*. The assent of the Charity Commissioners is necessary to enable the Plaintiffs to sell. It is a question of title, and as neither the Attorney-General nor the Charity

(*a*) 18 & 19 *Vict. c.* 124.

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Charity Commissioners are before the Court, no opinion ought therefore to be given unless the point is clear. If no certain conclusion can be come to or there be any doubt, the question must be answered in the affirmative.

The powers of sale and management contained in the charter do not affect the question. But it is clear that the intention was to establish a permanent charity, and to encourage an endowment by investments in land, the income of which was to be applied, for all future times, in keeping up the charity. Such appears to have been the practice of the corporation, for its funds, when sufficient, were from time to time invested in land.

The object of the act was to embrace within it all charity property yielding income. The 9th section is general and applies to "all or any charities in *England* or *Wales*." The interpretation clause (66) says that the word "endowment" shall include "all lands, &c. held in trust for any charity or for all or any of the objects or purposes thereof." This therefore is clearly an "endowment" within the 62nd section. An endowment, in its popular sense, is that which is bestowed or settled permanently, and it would be very difficult to say, that lands which since 1682 have been held in trust for a charity are not part of its endowment. Wherever charity money is vested in land it assumes the permanent form of an investment and becomes an endowment. This land was purchased from moneys raised 180 years ago and has ever since been held as a fixed property; this alone would be sufficient to impress on it a character of endowment.

The policy of acts is, to distinguish between a fixed permanent investment, and casual receipts arising periodically and accidentally from voluntary subscriptions; unless

less it can be shewn that the *corpus* of this property can be applied as income, it is within the act. They referred to *Johnson's Dictionary*, *Richardson's Dictionary*, and *Webster's Dictionary*, as to the meaning of the word "investment."

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Mr. *Wickens* in reply.

The MASTER *of the* ROLLS.

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The question is, whether the consent of the Charity Commissioners is required to render the sale of this real estate valid. The facts stated shew that no special trust attached to this property, but that it was to be applied for the general objects of the charity. The question depends on the construction of the 16 & 17 *Vict.* c. 137, s. 62; upon this, the question would seem to be, whether the property comes within the meaning of the word "*endowment*," as employed in this section, in contradiction to "*voluntary contribution*." The expression voluntary contributions must not be confined to annual subscriptions; it must clearly extend to donations; and if so, it cannot be confined to donations below any specified amount; it is equally applicable to 1,000*l.* as it is to 1*l.* It is clear also, that the word "endowment" would extend to and include any sum given for a specific and peculiar trust or object in connection with the particular charity. But the difficulty is this: at what point and under what condition does a donation become an endowment within the meaning of this section? The word "endowment" is not used here in its ordinary and popular sense; so used it is impossible to distinguish between a donation and an endowment. In ordinary parlance, a man who granted an annuity of 100*l.* out of his landed estate to the corporation of the sons of the clergy

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clergy would be said to endow it. In like manner, a man who gave 2,000*l.* at once to the corporation would be said to have endowed it. The section speaks of the "income arising from endowment." If the word "endowment" has reference to the production of an annual income only, the fact that the corporation invested its contributions in any permanent investment would alter the character of the money bestowed, and convert it from a contribution into an endowment; but it is impossible that the legislature can have meant to make the control of the Charity Commissioners dependent upon the circumstance whether or not the affluence or providence of the society had enabled or induced it to secure a portion of its funds by an investment in a permanent security.

It is suggested, in argument, that the cessation of voluntary contributions would at once, as a matter of course, put the whole of the property of the institution under the control of the Charity Commissioners; but I dissent from that argument. It is impossible that such could have been the meaning of the legislature. Occasional or accidental unpopularity might deprive an institution of the receipt of contributions for a series of two or three or more years, which might afterwards be renewed. I think it impossible to hold that such a circumstance would alter the character of the institution within the meaning of this section, so as to bring it within the scope of the act, and to exclude it from the exception contained in this section, during the period of its cessation from receiving voluntary contributions, and then give it the benefit of the exception again, and take it away from the control of the Charity Commissioners on the return of the subscriptions. But if the argument be well-founded, the authority of the Charity Commissioners must attach after the contributions have ceased for

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for a reasonable time, without a prospect of any returning contributions, which nevertheless, from altered circumstances, might be shortly afterwards received.

The cessation in the receipt of voluntary contributions cannot alter the character of the funds already received by the institution; and, assuming them to have been originally voluntary contributions, they continue to retain that character as long as they remain in possession of the corporation, although invested in some permanent security: provided always, that they are not by some competent authority set apart for or impressed with any particular trust. My opinion is founded upon the words of the sixty-second section,—"Where any charity is maintained," &c. &c. (*a*).

It is clear, from this language, that a donation or bequest would be an "endowment;" but if invested, the income arising from it would be exempted from the control of the board; unless, to use the words of the act, there was a "special application or appropriation," that is to say, an appropriation to some specific, as distinct from the general, purpose and object of the association.

My opinion, therefore, founded on the consideration of this section, taken by itself alone, is, that the word "endowment" has reference to an endowment made for some specific or particular purpose of trust. I use the words "specific or particular purpose or trust" advisedly, because a gift of a sum of money to the corporation *simpliciter*, or a gift in trust for the furtherance of the objects and purpose for which the corporation was established, would be various ways of accomplishing the same end, namely, making a donation to the corporation itself.

What

(*a*) *See ante*, p. 657.

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What words would amount to and constitute a "particular and specific trust," so as to bring a bequest or donation within the meaning of the word "endowment," according to the sense in which it appears to have been used in this section, taken alone, it is not necessary for the present purpose to consider, as no such question arises, when it does, the Court must determine it.

The land in question was paid for out of the general funds of the corporation voluntarily contributed to its support. The length of time that the investment has lasted cannot alter the character of it. The land remains as much a voluntary contribution as if the money which purchased it had been given to the corporation only twelve months ago, and had been by its managers invested in the purchase of land rather than in the purchase of stock, in consequence of their considering land to be the more eligible investment. The fact, of land being the investment, cannot convert the investment into an "endowment," if the purchase of stock or of exchequer bills would not have produced that effect. Upon this section alone, therefore, the word "endowment" does not, in my opinion, apply to land purchased by the corporation simply for the purpose of the investment of its funds or savings.

But the difficulty does not cease when this conclusion is arrived at, for on turning to the interpretation clause, I find such a startling and extensive meaning given to the word "endowment" as, if construed literally, would seem wholly to supersede section sixty-two; for it is impossible that an institution can possess any property or any right to any property whatever that may not be embraced by the term "endowment" so interpreted. A voluntary contribution, as contra-distinguished from an "endowment," could not, in this extended meaning,

be

be said to exist. The instant that the guinea is paid by the annual subscriber to the treasurer it is, to use the words of the interpretation clause, "money which for the time belongs to, or is held in trust for, the charity." Even tables and chairs and other personal chattels would come within the enumeration of "personal estate whatsoever." It could not have been the intention of the legislature to introduce a careful, though obscurely worded, exception from the general operation of the act, and then, by a general interpretation clause, wholly to negative the force of the exception, and, in fact, expunge it from the act. It is the duty of the Court, if possible, to reconcile and give effect to both sections. The only way in which this, in my opinion, can be done is to retain the interpretation I have already given to the word "endowment" in section sixty-two, namely, the devotion of property to a specific and particular trust, and to give it the same meaning in section sixty-six (the interpretation clause), that is, to hold that the meaning of this clause is not to enact that the possession by any charity of any property of the various kinds there enumerated constitutes an "endowment;" but that property of all the classes and character there specified may be made the subject of "endowment;" and therefore land, money, every species of real and personal property whatsoever, including even personal chattels,—provided any such were, either by the will of the donor or otherwise, impressed with a particular and specific trust—may be made the subject of "endowment" in favor of the charity.

This interpretation would not fetter the right of the charity, or the power of its managers, to dispose of property not so devoted, or, to use the words of the statute as construed by me, "not so endowed, to any purposes which they might consider necessary for the purposes of the

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the institution, and in the due discharge of the duties attached to them." This construction makes the distinction between endowed funds and funds voluntarily contributed, taken by the sixty-second clause, plain and unambiguous; and this, although not altogether satisfactory, is the only way to construe this very obscure statute, and give effect to both its provisions.

I cannot adopt the suggestion derived from the analogy of suits for the specific performance of contracts, in which the Court declines to force a title on a purchaser in a case where the question on which the title depends is not considered clear. The principle of these cases is, that there exist persons not before the Court, and therefore not bound by the decision, who may afterwards raise the same question; but that principle cannot affect the present case. The only persons who could hereafter raise this question would be the corporation itself, which, being present, is bound by this decision.

But the principal distinction is, that this is not a suit for the specific performance of a contract, but a special case, where both parties have agreed to take the opinion of the Court on the facts stated. The Court is bound to form and express its opinion. I have formed mine, and I declare it to be, that the consent of the Charity Commissioners to this sale is not necessary.

AN

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6. A testator bequeathed to his daughter a perpetual annuity of 250*l.* a-year. By a codicil, he directed that, instead of the money being paid to her, it should be paid to trustees for her, and he proceeded thus: — "after my daughter *C.'s* death, I give the above money to be divided as follows:—to her sister *Anna M.* 100*l.* a-year, and all the rest to be equally divided between her other brothers and sisters or their children." All her brothers and sisters predeceased *C.* Held, first, that *Anna M.* was entitled to a capital sum sufficient to produce 100*l.* a-year. Secondly, that the grandchildren, who survived their parents, took by substitution; and thirdly, that they took *per stirpes*. *Timins* v. *Stackhouse*. 434

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1. A testator died in 1834, having directed his executors and trustees, "so soon as convenient after his decease, to sell" his freehold inn. They attempted to sell in 1836, and were offered 900*l.*, which they refused. The property became greatly depreciated by a railway opened in 1843, and it still remained unsold in 1859. Held, that the trustees were liable for the difference between 900*l.* and the produce of a present sale. *Fry* v. *Fry*. Page 144
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3. A testatrix made provision for six almsmen and for other charitable objects, and she gave the residue of the income to the six almswomen. The income having greatly increased, Held, that the almswomen were not entitled to

the surplus income, as the effect would be to defeat the intention, by making them cease to be almswomen. Held, also, that the other objects were not entitled thereto, but that it was applicable to charity generally, and that the foundation of a school was a proper object to apply it to. *Re Ashton's Charity.* Page 115

4. A scheme, made in 1855, provided, that no person should act as trustee of the charity who should hold or occupy any part of the charity property. At that time, one of the trustees held a small piece of charity land, under a twenty-one years' lease granted in 1847 by public tender. Held, that he must either give up the lease or the trusteeship. *Foord and Others* v. *Baker.* 193

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3. A testator, having five daughters, gave a legacy to one and the residue to the remaining four (by name) "and their issue," but he afterwards directed, that any subsequent-born daughters and their issue should be entitled to equal

shares with the four daughters. One of the four died without issue in the life of the testator. Held, that there was no intestacy, that the daughters took as a class, and that those who survived took absolutely. *Re Stanhope's Trusts.* Page 201

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COPYRIGHT.

The Defendant was one of the proprietors and the editor of a weekly periodical, called *Household Words*:—Held, on a dissolution of the partnership, that he was not justified in advertising that the publication would be discontinued; for that the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets. But held, that he might advertise the discontinuance of the publication as regarded himself. *Bradbury* v. *Dickens*. 53

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3. Two trustees (*A*. and *B*.) were ordered to pay a sum of money into Court, this was paid by *A*. alone. They had severed in their defences and obtained but one set of costs. *B.'s* share of the costs was ordered to be paid to *A*. by way of contribution. *Prince* v. *Hine*. (No. 2.) 345
4. The costs on the allowance of exceptions for insufficiency may be made payable immediately. *Thomas* v. *Rawlings*. 375
5. The costs of all parties were, in 1857, ordered to be taxed and paid out of a fund in Court, and the residue was directed to be paid to the parties entitled. Solicitors, who had acted for some Defendants down to 1840, had no notice of the order, and their costs had been omitted in the taxation. Upon their petition, these costs were ordered to be taxed and paid by the parties to whom the residue of the fund had been paid over. *Armstrong* v. *Storer*. (No. 2.) 471
6. Costs of a special case held payable by the Defendant. *Sabin* v. *Heape*. 553
7. The costs of counsel in Chambers are always understood as being allowed, unless the contrary is expressed. *Greville* v. *Greville*. (No. 2.) 596

8. The Court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests, as regards their opposition to the claim of the Plaintiff, are identical. Therefore, the bill being dismissed with costs, each of such persons gets his separate costs. But a trustee and his *cestui que trust* gets but one set of costs between them; and so the person entitled to a share and all his incumbrancers have but one set of costs, which is payable to the first incumbrancer. *Remnant* v. *Hood.* (No. 2.) Page 613

9. Subsequent costs, in a partition suit, ordered to be borne by the parties according to the value of their respective shares. *Elton* v. *Elton.* (No. 1.) 632

See ISSUE AT LAW, 3.
OFFICIAL MANAGER.
STAYING PROCEEDINGS.
TAXATION.
TRUSTEE RELIEF ACT.

COVENANT FOR TITLE.

A. sold some building land to *B.*, and he covenanted for title. After some houses had been built on the land, the purchaser was evicted:—*Held*, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon. *Bunny* v. *Hopkinson.* 565

COVENANT TO PAY.

See MORTGAGE, 2, 3.

DAMAGES.

In a case where the Court has no jurisdiction to grant a specific performance of a contract, it has no jurisdiction, under the 21 & 22 *Vict.* c. 27, to award and assess damages for its non-performance. *Rogers* v. *Challis.* Page 175

See COVENANT FOR TITLE.

DEBENTURE.

Railway debentures were granted, by which the "undertaking, and all tolls and sums of money arising by virtue of the act, and all estate, right and interest of the company," were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of parliament, the railway was sold, and the purchase-money paid into Court:—Held, that the debentures, being prior in date, had priority over the judgments as against the purchase-money. *Furness* v. *The Caterham Railway Company.* 358

DEBTS.

See CHARGE ON REAL ESTATE.
POWER OF SALE, 2.

DECLARATION OF TRUST.

A. and *B.* were trustees of a will, and they and the widow were the executors. The widow, previous to her second marriage, transferred a sum standing in her sole name to *A.* and *B.*, upon certain trusts agreed on between her and her

second husband. After the marriage, the trustees of *A.* and *B.* declared the trusts accordingly. The fund was part of the testator's assets, but the second husband had no notice of that fact:—Held, that *A.* and *B.* held it on the trusts of the settlement, and not those of the will. *Cooper* v. *Wormald.* Page 266

DEED.

See BANKRUPTCY.
PARTITION.

DEFENDANT OUT OF JURISDICTION.

The 4 & 5 *Will.* 4, c. 82, s. 2, is superseded by the 31st General Order of 1845, and therefore, unless the defendant has been in the jurisdiction within two years before the bill filed, the Court cannot, by way of substitution for the ordinary service of process, direct notice in the *Gazette*. *Thurlow* v. *Treeby.* 624

See SERVICE ABROAD.

DELIVERY UP OF INSTRUMENTS.

1. Principles on which Courts of Equity proceed, in ordering the delivery up of instruments on which actions at law may be brought. *Cooper* v. *Joel.* 313
2. A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first instalment, the plaintiffs were *non pros'd.* Held, that although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence. *Cooper* v. *Joel.* Page 313

DEMONSTRATIVE LEGACY.

See SPECIFIC LEGACY, 2.

DEMURRER.

See ADMINISTRATION AD LITEM.
PLEADING.

DESCENDANTS.

1. Bequest to each of *A.'s* sisters and brothers, or to such of them as may be living at the time of my decease, in case of those who may not be in existence at my death, to go to their respective descendants. Held, that the descendants of a sister who was dead at the date of the will were excluded. *Smith* v. *Pepper.* 86
2. Bequest to "descendants" of *A.*, "in such proportions as each may be entitled" under the statute of distributions. Held, that a child of *A.* took in exclusion of grandchildren. *Smith* v. *Pepper.* 86

DEVISE.

A testator gave and bequeathed the "residue of his estate, after taking out 1,000*l.*," to his uncle. Held, that the residuary real and personal estate passed, the testator having previously made pecuniary gifts out of "his freehold and

personal estate." *Hawksworth* v. *Hawksworth*. Page 1

See COPYHOLDS.

DIRECTOR.

1. The directors of a loan company were empowered to borrow money, but directors "who were concerned in or participated in the profits of any contract with the company" vacated their offices. The chairman lent money to the company at high interest, which was afterwards lent out at a profit:—Held, that this was warranted by the rules. *Bluck* v. *Mallalue*. 398
2. Discounting the bills of a director is a lending of money within a clause prohibiting loans to shareholders. *Ibid.*

See SPECIFIC PERFORMANCE, 2.

DISCOVERY.

See PRIVILEGE.
PRODUCTION OF DOCUMENTS, 1, 2, 3, 4.

DISMISSAL FOR WANT OF PROSECUTION.

After a winding-up order, the name of the official manager had been substituted for that of three members, who sued on behalf of themselves and the other members. A motion was subsequently made by the Defendant to dismiss for want of prosecution. The order was made, with costs to be paid by the Plaintiffs, and not by the official manager, who had not adopted the suit. *Caldwell* v. *Ernest*. (No. 2.) 42

See STAYING PROCEEDINGS.

DISSOLUTION.

See COPYRIGHT.
PARTNERSHIP.

DONATIO MORTIS CAUSA.

1. A promissory note, payable to order, may be the subject of a *donatio mortis causâ*, and will pass thereby, though unindorsed. *Veal* v. *Veal*. Page 303
2. The gift of bills of exchange payable to the donor or order, by way of a *donatio mortis causâ*, supported. *Rankin* v. *Weguelin*. 309

ECCLESIASTICAL LEASE.

See SPECIFIC PERFORMANCE, 4.

EJUSDEM GENERIS.

See ANNUITY, 2.

ELECTION.

A testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only. He appointed the estate to some of his children, and the fund to his children and to a grandchild (who was not an object):—Held, that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power. *In re Fowler's Trust*. 362

See SPECIFIC PERFORMANCE, 3.

[illegible]

EXECUTOR.

One of several executors may settle an account with a person accountable to the estate, and in the absence of fraud the settlement will be binding on the others, though dissenting. *Smith* v. *Everett.* Page 446

EXONERATION.

A testator bequeathed certain personal property to his wife specifically, and he devised his real and personal property to trustees for sale, and out of the produce, in the first place, to pay his debts, funeral expenses and legacies; and, in the next place, to invest the surplus, and, subject to the trusts of resale, to pay the income to his wife for life, with remainder over. By a codicil, he gave all his personal estate to his wife. Held, that the widow was entitled to the personal estate exonerated from the debts and legacies, and that they were primarily charged on the real estate. *Lance* v. *Ag-[illegible]* 65

EXTRINSIC EVIDENCE.

A testator bequeathed a legacy to his niece, *E. S.* After her death, he made another will, in which the same bequest was copied. The latter alone was proved. The legacy was claimed by *E. J. S.*, a great-great-niece. Held, that she was entitled, and that parol evidence was inadmissible to show that the deceased niece was intended. *Stringer* v. *Gardiner.* 35

FAILURE OF CONSIDERATION.
See CONSIDERATION.

FORFEITURE.
See BANKRUPTCY.

FRAUD.
See PURCHASE-MONEY.
SOLICITOR AND CLIENT, 2, 3.

FREIGHT.
See SHIP, 1.

FURNITURE.
A testator directed his furniture in *Gloucester Square* to be applied in payment of his debts, and in a subsequent part of his will, he bequeathed his furniture in *England* to his sisters. The testator removed the furniture in *Gloucester Square* to another residence:—Held, that it did not pass to his sisters. *Blagrove* v. *Coore.* Page 138

GENERAL ORDER (31ST OF 1845).
See DEFENDANT OUT OF JURISDICTION.

GLEBE.
See SPECIFIC PERFORMANCE, 4.

GOODWILL.
1. The goodwill in a partnership business does not, on the death of one partner, survive beneficially to the others; when it has any value, a due proportion belongs to the estate of the deceased partner, but the surviving partner has still the right to carry on the same business and at the same place. *Smith* v. *Everett.* Page 446
2. After the decease of one of two partners in a bank, the survivor sold the business for 10,000*l.* Held, that the estate of the deceased was entitled to a share of so much of the 10,000*l.* as was attributable to the goodwill, and special inquiries were directed to ascertain the value, having regard to the fact, first, that the partnership premises belonged to the survivor; secondly, that he had still the right to carry on the same business in the same locality; and thirdly, that the sole right of issuing notes, under the 7 & 8 *Vict.* c. 32, belonged to him. *Ibid.*
3. Form of decree in *Cook* v. *Collingridge* (*Jacob,* 607), containing a declaration of the rights of surviving partners to carry on the same trade, after the sale of the partnership premises and business; but that, notwithstanding this, the chance of a purchaser of the partnership property to retain the old customers could not be treated as of no speculative value. *Cook* v. *Collingridge.* 456

GRANDCHILD.
See DESCENDANTS, 2.

GUARANTEE.
See DELIVERY UP OF INSTRUMENTS, 2.

GUARDIAN AD LITEM.
1. A guardian *ad litem* must be ap-

pointed to infants who are served with petitions, intituled "in matters" and not in causes. *In re Barrington.* Page 272

2. An order of course for the appointment of such a guardian *ad litem* may be obtained as of course. *Ibid.*

HEIR AND EXECUTOR.
See TIMBER, 1.

HEIR AT LAW.
See ISSUE AT LAW, 1, 3.

HUSBAND.

A testator referred to his five daughters as the wives of five persons he named, and he gave life interests in separate legacies to his five daughters, and afterwards to their respective husbands. Held, that the latter gift was confined to their then existing husbands. *Franks* v. *Brooker.* 635

HUSBAND AND WIFE.
See HUSBAND.
WIFE.

ILLEGITIMATE CHILDREN.
See BASTARD.

IMPLICATION.
See WILL, 1.

INDEMNITY CLAUSE.

The trustee indemnity clause does not exonerate a trustee from the consequences of a breach of trust. *Brumridge* v. *Brumridge.* Page 5

INFANT.

The Plaintiff's mother and the Defendant were tenants in common in fee. She died in 1851, and her interest descended on the Plaintiff, her heir (then an infant). The Defendant, who had previously occupied the estate, continued in possession and thenceforward excluded the Plaintiff. The Plaintiff attained twenty-one in 1857. Held, that the Defendant was accountable to the Plaintiff for the whole period, and ought to be charged with an occupation rent. *Pascoe* v. *Swan.* 508

INJUNCTION.

1. Though *A.* may be disentitled, by acquiescence, to an injunction to stop *B.'s* manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that *B.* is entitled to an injunction to prevent *A.'s* recovering damages at law. Equity may leave both parties to their legal rights. *Bankart* v. *Houghton.* 425

2. Acquiescence in the erection of noxious works, while they produce little injury, does not warrant the subsequent extension of them to an extent productive of great damage. *Ibid.*

3. Injunction to prevent, on the ground of acquiescence, a party injured by copperworks from enforcing a judgment recovered by

him for damages at law refused with costs. *Bankart* v. *Houghton.* Page 425

See CANAL.
COPYRIGHT.
TIMBER, 2.

INSUFFICIENCY.
See PRIVILEGE.

INSURANCE.
See BREACH OF TRUST, 2.
POLICY.

INTEREST.
Bequest of 1,000*l.*, the "interest" for *A.* for life, with power to dispose of the "principal" to her children by will, and if no will, then "the said legacy" to go to her children "at twenty-one years of age." *A.* died in 1840, and her only child attained twenty-one in 1858. Held, that he was entitled to the intermediate interest on the legacy. *Thruston* v. *Anstey.* 335

INTESTACY.
See CLASS, 3.

ISSUE AT LAW.
1. Heir at law refused a second issue to try the validity of a will by which he was disinherited. *Swinfen* v. *Swinfen.* 148
2. The rules respecting new trials are less stringent in equity than they are at law, and the practice here has always been, not to consider whether there was evidence which would support the finding of the jury, and in that case to refuse a new trial, but the course in courts of equity has been, to consider whether, having regard to the entire subject matter and to the whole of the evidence given at or before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end, and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modification as it may consider desirable for the fair, thorough and impartial sifting of the whole matter. *Swinfen* v. *Swinfen.* Page 148
3. Heir at law ordered to pay the costs of an issue to try the validity of the will, in which he had failed. *Ibid.*

See LEGAL RIGHT.

"ISSUE," READ "CHILDREN."
The word "issue" was used in a will on several occasions as equivalent to "children," and the issue were, in some instances, spoken of in reference to their "parent." Held, that "issue" must receive the same construction throughout the will. *Rhodes* v. *Rhodes.* 413

JOINT TENANCY.
See SURVIVORSHIP.

JUDGMENT.
See DEBENTURE.

LACHES.

See SHIP, 1.

LANDLORD AND TENANT.

See SPECIFIC PERFORMANCE, 1.

LANDS CLAUSES ACT.

1. A railway, having severed the arable lands from the farm buildings: Held, that the compensation-money might be applied, under the Lands Clauses Act, in the erection of new farm buildings; but that the company were not bound to pay the costs of obtaining the necessary orders for that purpose. *Re the Oxford, &c. Railway Company.* Page 571

2. The words "any of the purposes aforesaid" used in the 80th section of the Lands Clauses Consolidation Act (8 & 9 *Vict.* c. 18) are confined to the purposes mentioned in that clause, and do not extend to those "purposes" mentioned in the previous part of the act. *Ibid.*

See RAILWAY.

LAPSE.

See CLASS, 2, 3.

LEASE.

Under an executory agreement to grant a lease of an hotel, with general and usual covenants, *it was held*, under the circumstances, that the lease ought to contain a power of re-entry on the lessee's becoming bankrupt or taking the benefit of the Insolvent Act. *Haines* v. *Burnett.* 500

See CHARITY, 6.

POWER TO LEASE.

RENEWAL.

SPECIFIC PERFORMANCE, 1, 3, 4.

LEGACY.

1. A testator said—"I leave my wife 200*l.* to dispose of as she may think proper, and the interest of the residue of my property, viz. the sum of 454*l.* 9*s.* 9*d.* for life." He subsequently stated that he had 200*l.* in the savings bank, and 454*l.* 9*s.* 9*d.* and 30*l.* in addition in another bank. His property consisted of the 454*l.* 9*s.* 9*d.* and 30*l.* and some furniture, and there was in the savings bank a sum of 200*l.* in his wife's name, being part of her separate estate: Held, that this latter sum was the 200*l.* referred to in the will. *Hesketh* v. *Magennis.* Page 395

2. By his will, the testator gave a legacy "equally between my brothers and sisters now living;" and he directed that their shares should not lapse by their deaths in his lifetime, but should go to their executors. By a codicil of the same date, he bequeathed another legacy "between my brothers and sisters in like manner as I have directed by my will." Held, that the class mentioned in the codicil were not the same as that in the will; that the "manner" referred to the mode in which the class were to take, and not to the class itself, and consequently that the representatives of a sister who predeceased the testator took no interest in the second legacy. *Re Wilder's Trusts.* 418

3. A testator bequeathed the income of his residue to his widow for life, but desired "that in case any-

thing should occur that her income is not sufficient, she shall be at liberty to go to the principal." He gave the residue to his brothers. The residue only produced 30*l.* a-year, and the widow claimed the whole capital. Held, that she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life. *Re Pedrotti's Will.* Page 583

4. A testator referring to his daughter in his will said, "should she follow the paths of virtue and obedience to the wishes of my dear wife and my executors, they may give her, by instalments when they think proper, the sum of 200*l.*" The executors disclaimed. Held, that the daughter was entitled to the payment of 200*l.* *Maud* v. *Maud.* 615

See WILL and the References.

LEGACY DUTY.

A specific fund was bequeathed for payment of debts. A claim being made in respect of a debt barred by the statute, the administrator offered 1,150*l.* as the price to be paid for a release of all claims. Legacy duty was claimed on this account. Held, that it must be borne by the administrator, and not by the creditor. *Greville* v. *Greville.* (No. 2.) 596

LEGAL RIGHT.

Where a case stands over in order that a party may proceed at law, and he neglects to do so, the Court treats the case as if the legal right had been decided against him. *Cooper* v. *Joel.* Page 313

LEGATEE.

1. A testator devised an estate to one for life, and afterwards to be sold, and the proceeds equally divided between "his surviving nephews and nieces." He had, in another part of his will, designated *A.* and *B.*, (who were really his great nephew and great niece,) as his nephews and nieces. Held, that *A.* and *B.* did not participate in the proceeds. *Thompson* v. *Robinson.* 486

2. A testatrix, after referring to a debt due from her to a partnership of *A.* and *B.* deceased, bequeathed a fund "upon trust to pay and divide the produce of such stock to and for the benefit of their respective estates." *A.* and *B.* were not partners, but one was the successor of the other. The sum of 4,517*l.* was claimed by *A.*, and 197*l.* by *B.* against the testatrix's estate. Held, that the fund was divisible between their estate equally, and not in proportion to the debts due to *A.* and *B.* respectively. *Greville* v. *Greville.* (No. 1.) 594

See BASTARD.

EXTRINSIC EVIDENCE.

HUSBAND.

WIFE.

LIEN FOR PURCHASE-MONEY.
See PURCHASE-MONEY.

LUNACY.
See PARTNERSHIP, 1.

MARRIAGE SETTLEMENT.
Where, prior to a marriage, the parties transfer a fund to trustees upon trusts agreed on by parol only, and the instrument declaring the same trusts is executed after the marriage, it is perfectly valid as an instrument for valuable consideration. *Cooper* v. *Wormald.* Page 266
See DECLARATION OF TRUST.
PARENT AND CHILD.

MIDDLESEX REGISTRY.
An agreement to mortgage a *Middlesex* property does not come within the Registry Act; therefore, where the owner of property in that county had first mortgaged to *A.*, and then agreed to mortgage to *B.*, and had subsequently mortgaged to *C.*, and *C.* had registered, and *B.* had not. Held, that *C.* had not obtained priority over *B.* *Wright* v. *Stanfield.* 8
See REGISTRATION.

MINES.
See POWER TO LEASE.

MORTGAGE.
1. A Court of Equity will not decree the specific performance of a contract to borrow a sum of money on mortgage. *Rogers* v. *Challis.* Page 175
2. If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, this Court will prevent his suing at law to recover the mortgage money. *Palmer* v. *Hendrie.* 349
3. A mortgagor having transferred the equity of redemption, the transferees and mortgagee joined in a partial alienation of the property, but the money was received by the transferees alone. Held, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay. *Ibid.*
See MIDDLESEX REGISTRY.
REGISTRATION.

MORTMAIN.
1. Bequest to a charity of shares in the *Rhymney Iron Company*, which manufactured iron obtained from its own estates. Held void under the Statute of Mortmain. *Morris* v. *Glynn.* 218
2. The question whether the shares in a company can be bequeathed to a charity depends on whether the substantial object of the company is or is not a dealing with land, and whether the land held by it is or is not merely ancillary to a trading independent of land. *Ibid.*
See CHARITY.

MUNICIPAL CORPORATION ACT.
See CHARITY, 5.

NEPHEW.
See LEGATEE, 1.
WILL, 1.

NEXT PRESENTATION.
See WILL, 3.

NEW TRIAL.
See ISSUE AT LAW.

NOTICE.
See SHIP, 1.

NUISANCE.
See INJUNCTION, 2.

OFFICIAL MANAGER.
A suit was instituted by three members of a *Freehold Land Society*, on behalf, &c., against another member. The society was afterwards ordered to be wound up; and on the application of the three Plaintiffs, the name of the official manager was substituted as Plaintiff. The Judge would not allow the official manager to prosecute the suit, who then moved to stay proceedings therein, on such terms as the Court should think fit. The motion was refused with costs, to be paid by the official manager personally. *Caldwell* v. *Ernest.* (No. 1.) Page 39
See DISMISSAL FOR WANT OF PROSECUTION.

"OR," READ "AND."
See ANNUITY, 1.

PARENT.
See "ISSUE," READ "CHILDREN."

PARENT AND CHILD.
1. As to the obligation of a father to make good promises made on the marriage of his daughter, to his intended son-in-law, to leave her a share of his property, and on the faith of which the marriage took place. *Loxley* v. *Heath.* 523
2. A father, prior to the marriage of his daughter, in a correspondence with his intended son-in-law, stated that all his property would be equally divided amongst his children at his decease. A settlement was executed prior to the marriage, which omitted all mention of this. Held, that there was an obligation binding on the father; but the first letter having alluded to a prior conversation applying the representation to children who should survive the father, the Court held, that this condition, though not mentioned, affected the whole of the subsequent correspondence, and that the obligation was conditional on her surviving. She predeceased her father, leav-

ing a child. Held, that the father was under no obligation to leave any part of his property to the daughter or her issue. *Loxley* v. *Heath.* Page 523

PARTIES.

At the hearing a cause was ordered to stand over for want of parties, and the Plaintiff was to amend his bill by adding the names of such parties or their legal personal representatives. One of them was dead and had no legal personal representative. A motion by the Plaintiff for liberty to proceed in the absence of such representative, or for the appointment of a person to represent his estate, was refused with costs. *Williams* v. *Page.* (No. 3.) 373

See ADMINISTRATION AD LITEM.
PLEADING.

PARTITION.

1. Many persons being interested in a partition deed, it was directed to be enrolled, with liberty to any party to have a duplicate at his own expense. *Elton* v. *Elton.* (No. 1.) 632
2. Where the parties are equally interested, the practice is to give the custody of the deeds to the Plaintiff, but where they are not, then they are usually given to the person having the greatest interest. *Ibid.*

See COSTS, 9.

PARTNERSHIP.

1. A notice of dissolution given to a lunatic partner is sufficient to put an end to the partnership. *Mellersh* v. *Keen.* Page 236
2. Notice by two partners to a third that "we *shall* dissolve the partnership" on the 31st of *December*, operates as a dissolution on that day. *Ibid.*

See BANK.
COPYRIGHT.
GOODWILL.

PER CAPITA.

Bequest of shares, the profits to be invested and the interest applied in the education of the children of *A.* and *B.*, in equal shares; "and on their attaining twenty-one, the whole to be sold and divided equally among them." There was a gift over if *A.* and *B.* should die without issue. *A.* and *B.* had no child at the testator's death:—Held, that all the children of *A.* and *B.* took, and that the class was not limited to those born when the first attained twenty-one; and secondly, that the children of *A.* and *B.* took *per capita*, and not *per stirpes*. *Armitage* v. *Williams.* 346

PER STIRPES.

See ANNUITY, 6.
PER CAPITA.

PETITION.

See COSTS, 5.
GUARDIAN AD LITEM.
TRUSTEE RELIEF ACT, 2.

PLEADING.

A bill was filed against the Scotch executors of a domiciled Scotch-

man, to set aside a sale to their testator of shares in a Scotch company, and to make them account for the dividends received by the testator thereon. Held, on demurrer, that the suit could not proceed in the absence of a legal personal representative of the testator, duly constituted in *England*. Held, also, that the objection could not be removed by appointing a person to represent the estate under the 15 & 16 *Vict.* c. 86, s. 44. *Maclean* v. *Dawson*. (No. 1.) P. 21

See ADMINISTRATION AD LITEM.

PARTIES.

POLICY.

A proposal for a life policy was accepted, on behalf of a *London* assurance company, by their agent in *Australia*, who acted in the transaction through the medium of a sub-agent, and the premium was paid. It was held binding on the company, although the agent had no authority to appoint a sub-agent, and although there were some informalities, but of form only. *Rossiter* v. *The Trafalgar Life Assurance Association*. 377

See VOLUNTARY SETTLEMENT.

PORTION.

1. A testator directed his trustees to make a settlement of his real estate, containing a power to the tenant for life to charge the estate with a sum for portions for his younger children. Held, that in determining the rights of the younger children, the portions could not be treated as legacies under the will, but that such rights must depend on the terms of the instrument executing the power. *Remnant* v. *Hood*. Page 74
2. An estate was charged with portions for younger children, "to be raised and levied" after the decease of the tenant for life, "and to be forthwith paid and payable." Held, that a younger child who attained twenty-one, but died in the life of the tenant for life, took a vested interest. *Ibid.*

See ADVANCEMENT.

THELLUSSON ACT, 1.

POWER.

1. Parents had life interests in a sum of money, with power to appoint it to their children. On the marriage of an infant daughter, by a settlement to which she and her intended husband were parties, the parents appointed the reversionary fund to trustees, on trust for the daughter, the intended husband and the children of the marriage. The daughter and her husband survived the parents. Held, that the appointment to the husband and children, though not objects of the original power, was valid, notwithstanding the infancy of the daughter. *Fitzroy* v. *Duke of Richmond*. (No. 2.) 190
2. Where an intention is established to pass property which is the subject of a power, a Court of Equity will give effect to the disposition, and hold that the property passes under it, although the intention to

dispose of it by means of the power is not shown. *Carver* v. *Richards.* Page 488

3. A married lady had a power to appoint under a deed of 1807. An invalid and fraudulent deed of 1813 purported to give to her and her husband a joint power of appointment over the same property. They executed the latter power in 1820, reserving a power of revocation and new appointment to the lady. In 1829, after the death of her husband, she professed to execute the power contained in the deed of 1820, and all powers in the deeds therein recited, and all other powers enabling her, and she confirmed the appointment of 1820, which was in favor of legitimate objects of the power under the deed of 1807. The deed of 1807 was recited in the deed of 1820. Held, that the deed of 1829 was a valid execution of the power contained in the deed of 1807. *Ibid.*

4. A testator devised an estate upon the same trusts, &c. as his wife, by her will, should declare "with respect to the disposition of her residuary personal estate." The widow bequeathed the estate to *A.*, and her residue to *B.*, *C.* and *D.* Held, that the widow had an absolute, and not a restricted power, and that the estate did not pass with the widow's residue, but belonged to *A.* *Bristow* v. *Skirrow.* (No. 1.) 585

See ADVANCEMENT.
ELECTION.
REFERENTIAL TRUSTS, 1.

POWER OF ADVANCEMENT.
See ADVANCEMENT.

POWER OF ATTORNEY.
See VOLUNTARY SETTLEMENT.

POWER OF RE-ENTRY.
See LEASE.

POWER OF SALE.

1. A testator gave four shares to his wife. He afterwards said—"Should the four shares be sold, the purchase-money is to be placed in the funds and she is to have the interest thereof during her natural life; but should she not sell the shares, whatever sum may annually accrue from them, beyond 200*l.*, is to be reserved, as a kind of sinking fund for the protection of those four shares in the *Globe* newspaper. At her decease, the whole of the property arising from the shares or from their sale to be divided between *M.* and *L.*" His widow was not an executrix. Held, that the widow had either a power to sell, or a right to call for a sale of the shares. Secondly, that a large fund, which had accumulated from income beyond 200*l.* a-year, and which was not required for the protection of the shares, did not belong to the widow, but formed *corpus.* *Varlo* v. *Faden.* Page 255

2. Under a direction to pay debts, the executors of the original executor sold the testator's real estate twenty-seven years after the testator's death, and nine years after the death of the executor.

Held, that a good title could be made under the implied power of sale, and that the vendors were not bound to state whether there existed any debts which made a sale necessary. *Sabin* v. *Heape*. Page 553

3. A settlement of personal estate contained a power to alter and vary, and a covenant to settle future acquired real and personal estate on similar trusts. Held, that a power of sale might be introduced into a settlement of subsequently acquired real estate. *Elton* v. *Elton*. (No. 2.) 634

POWER TO LEASE.

In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts, &c., and subject to the same powers, &c., or as near thereto as the nature and tenure of the property would admit of. Held, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them. *Scott* v. *Steward*. 367

PRACTICE.

See AFFIDAVIT OF SERVICE.
CHAMBERS.
CONDUCT OF SALE.
COSTS.
DEFENDANT OUT OF JURISDICTION.
DISMISSAL FOR WANT OF PROSECUTION.
See GUARDIAN AD LITEM.
INJUNCTION.
LEGAL RIGHT.
PARTIES.
PLEADING.
PRODUCTION OF DOCUMENTS, 1.
SERVICE ABROAD.
SOLICITOR AND CLIENT, 1.
STAYING PROCEEDINGS.
TITLE DEEDS.

PRECATORY TRUST.

A testator devised and bequeathed his real and personal estate to his widow, "to and for her own use and benefit absolutely, having full confidence in her sufficient and judicious provision for my dear children." Held, that there was no trust in favor of the children. *Fox* v. *Fox*. Page 301

PRINCIPAL AND AGENT.

Though an agent cannot delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done. *Rossiter* v. *The Trafalgar Life Assurance Association*. 377

PRIORITY.

See DEBENTURE.
MIDDLESEX REGISTRY.
REGISTRATION.

PRIVILEGE.

1. A solicitor declined answering some interrogatories, on the ground that he had obtained all his information "whilst acting as the solicitor" of his co-Defendant. Held, that he had not brought himself

within the rule as to professional privilege. *Thomas* v. *Rawlings.* Page 140

2. A solicitor said he had obtained his information "either as a creditor or as the solicitor" of his client. Held, that this statement must be taken most strongly against the solicitor, and that he was bound to give the discovery. *Ibid.*

See PRODUCTION OF DOCUMENTS.

PRODUCTION OF DOCUMENTS.

1. *A.*, the owner of an estate, first mortgaged it to *B.*, and afterwards sold and conveyed it to *C.*, to whom he delivered the title deeds. In a suit by *B.* against *C.*, insisting on his priority, *C.*, by his answer, professed to state the contents of the deed of conveyance to *A.* He admitted the possession of this and the other title deeds, but insisted that he was a purchaser for valuable consideration without notice; and he said that *B.* had no right or title to the production of the deeds, or any interest therein. Held, that B. was entitled to the production of the conveyance to *A.*, but that the other title deeds were privileged. *Hunt* v. *Elmes.* 62

2. A trustee taking counsel's opinion to guide himself in the administration of his trust, and not for the purpose of his defence in a litigation against himself, is bound to produce them to his *cestui que trust;* but the relation of trustee and *cestui que trust* must, for that purpose, be first established. *Wynne* v. *Humberston.* Page 421

3. A mere claimant to an estate is not entitled to the production of cases and opinions taken by a trustee. *Ibid.*

4. Documents accompanying a case for the opinion of counsel are privileged. *Ibid.*

5. Whether one Defendant can call on a co-Defendant to produce documents in his possession, *quære? Ibid.*

PRODUCTION OF TITLE DEEDS.

See TENANT FOR LIFE AND REMAINDERMAN.

PROMISE.

See PARENT AND CHILD.

PROMISSORY NOTE.

See DONATIO MORTIS CAUSA, 1.

PUBLIC COMPANY.

1. A joint stock company, whose shares are represented to be transferable by delivery, is not necessarily illegal at common law. *Re the Mexican and South American Company.* 474

2. A joint stock company established without act or charter in 1835, and prior to the Joint Stock Companies Registration Act (7 & 8 *Vict.* c. 110), does not, upon an alteration in the shareholders subsequent to that act, require registration. *Ibid.*

3. The case of *Blundell* v. *Winsor* (8 *Sim.* 60), commented on. *Ibid.*

See CONTRIBUTORY.
DIRECTOR.
OFFICIAL MANAGER.
SPECIFIC PERFORMANCE, 2.
RAILWAY.

PURCHASE-MONEY.

A. transferred shares to *B.* by a deed executed by both parties, which admitted the payment of the consideration money. The money not having really been paid, *A.* filed a bill against *B.* to compel payment. *B.* stated that a third person (*C.*) had told him that he had purchased the shares and put them into *B.'s* name as a trustee, and that *B.* would incur no responsibility, as the shares had been paid for; that he *C.* produced the deed in question, which he, *B.*, signed, on the faith of the recital contained in it, that the purchase-money had been paid. Held, that this was no defence to the Plaintiff's demand, and that *B.* was bound to pay the purchase-money. *Wilson* v. *Keating*. Page 121

RAILWAY.

1. An Act of Parliament authorized the lessees of mines to make a railroad to a canal, through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railway and paying an annual rent. The mortgagee afterwards entered into possession and received the rent for some time. Held, that the mortgagee and all claiming under him were bound by the agreement. *Mold* v. *Wheatcroft*. Page 510
2. Where an Act of Parliament authorizes the construction of a railway over the land of another, upon making compensation, and the railway is made without authority from the owner of the land, but is afterwards used for fifteen years with his knowledge, he will not be permitted to interfere with the possession. All he is entitled to is to have the compensation assessed and paid. *Ibid.*
3. An engine-house was erected on the lands of another for working a railway. The railway was authorized by an Act of Parliament, but the erection of the engine-house was not. Held, that after an acquiescence on the one hand, and an undisturbed enjoyment on the other for several years, the possession would not be disturbed, but that a proper compensation must be assessed and paid. *Ibid.*
4. If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, neither the owner of the land nor any person claiming under him can dispute the right of the builder to use the land. *Ibid.*
5. Persons acquiring interest in lands over which a railway is in operation at a rent, are bound to inquire as to the nature of the holding. *Ibid.*

6. A railway company proposed taking a part of the garden attached to a dwelling-house, thereby cutting off the end of the garden and the summer-house. Held, that under the 92nd section of the Lands Clauses Consolidation Act, they were bound to take the whole property. *Cole* v. *The West London and Crystal Palace Railway Company.* Page 242

See DEBENTURE.

REAL AND PERSONAL ESTATE.

See CHARGE ON REAL ESTATE.
EXONERATION.
TIMBER, 1.

RECEIPT FOR PURCHASE-MONEY.

See PURCHASE-MONEY.

REDEMPTION.

See MORTGAGE, 2, 3.

REFERENTIAL TRUSTS.

1. A testator bequeathed his personal estate to his wife absolutely, and he devised two real estates to her for life, and after her death, on trust for sale and division amongst other parties. Having sold one of the estates, he made a codicil changing his trustee, and authorizing the sale of the remaining estate at any time, and he gave the produce thereof to his wife for life, and then "upon the trusts and for the intents and purposes in his will expressed and declared as concerning all his real and personal estate; and in all other respects he confirmed his will. Held, that the produce of the estate was not divisible amongst all the devisees and legatees rateably, but was subject to the trusts declared by the will. *Baker* v. *Richards.* Page 320

2. A testator gave a legacy to his daughter *Lucy*, and gave to her and her husband a similar power and control over it as was given by the settlement of her sister. And he directed, that if *Lucy* should die without issue, her legacy should revert to his surviving children. The settlement of the other daughter gave to her and her husband a joint power, and in default of appointment to the surviving husband, a separate power to appoint to their children, and in default of children, a separate power to the daughter to appoint the fund to any one by will. Held, that as there was an inconsistency, the will must be read strictly, and that *Lucy* had no power of testamentary appointment, but only a joint power with her husband to appoint to children. *Crossman* v. *Bevan.* 502

REGISTRATION.

An unregistered equitable charge on the equity of redemption of a property in *Middlesex* postponed to a subsequent registered mortgage of it. *Moore* v. *Culverhouse.* 639

See MIDDLESEX REGISTRY.
PUBLIC COMPANY, 2.

REGISTRY.

See MIDDLESEX REGISTRY.
REGISTRATION.

RENEWAL.

1. By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents or by mortgage. A renewal became impracticable. Held, that the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life. *Morres* v. *Hodges.* Page 625
2. The renewal of an ecclesiastical lease having become impracticable the tenant for life held entitled to the whole rents. *Richardson* v. *Moore. Tardiff* v. *Robinson.* 629

REVERSION.

See REVERSIONARY INTEREST.

REVERSIONARY INTEREST.

1. Purchase of a reversionary estate tail of a person without issue set aside merely for inadequacy of consideration, there being no fraud or pressure, and with costs, the purchaser having resisted the relief; but he was ordered to pay those occasioned by his unfounded allegations of fraud. *St. Albyn* v. *Harding.* 11
2. When sales of reversionary interest are set aside from mere inadequacy of consideration, it is upon the repayment of the consideration with interest at the rate of 5*l.* per cent. *Ibid.*

SALE BY COURT.

See TITLE DEEDS.

SATISFACTION.

1. Sums advanced by a testator to his children on their marriage, and to establish them in business. Held, a satisfaction *pro tanto* of their shares of the residue bequeathed to them by his will; but *secus* as to small gifts made, from time to time, by the testator to such children. *Schofield* v. *Heap.* Page 93
2. A gift of a share of a residue to a child: Held, *pro tanto*, satisfied by a provision made by the testator on her marriage after the date of the will. *Beckton* v. *Barton.* 99

SCHEME.

See CHARITY, 1, 2, 3, 4.
SCHOOL.

SCHOOL.

A charitable foundation established in 1701, for the support and education of boys, was fixed by the founder in the middle of the city of *Bristol.* The Court, on its appearing beneficial, sanctioned its removal to the vicinity outside the city, and authorized the purchase of a site for that purpose, notwithstanding a great opposition. *Re Colston's Hospital.* 16

SCOTLAND (INVESTMENT IN).

See STATUTE, 1.

SERVANT.

The plaintiff acted as the land agent and house steward of the testator, but he resided out of the house:—Held, that he was entitled, under a bequest "to all my servants and day labourers who shall be in my service at the time of my death one full year's wages." *Armstrong* v. *Clavering*. Page 226

SERVICE ABROAD.

1. As to the extent to which the Court will enter into the merits, on an application to serve its process out of the jurisdiction, and on an application to discharge such an order. *Maclean* v. *Dawson*. (No. 2.) 25
2. The Court will not, on a motion to discharge an order for service abroad, enter into the question whether the matter can be better decided in a suit there than in this Court. Such a question ought properly to be raised after appearance. *Ibid.*

See DEFENDANT OUT OF JURISDICTION.

SETTING ASIDE PURCHASE.

See REVERSIONARY INTEREST.

SETTLED ACCOUNT.

See EXECUTOR.
TAXATION, 2.

SETTLEMENT.

See ADVANCEMENT.
POWER OF SALE, 3.

SEVERANCE OF DEFENCES.

See COSTS, 3, 8.

SHIP.

1. A shipowner, on the 20th of *March*, 1857, chartered his ship to *A.* for a voyage to *Hong Kong*. The freight was payable "by approved bill on *London* at three months' date, or cash under discount, following the delivery of a certificate to the charterers, signed by the consignees" of the delivery of the cargo. On the 24th of *March*, the shipowner assigned the freight to *C.*, who gave no notice to *A.* until *November* following. It turned out, that on the 23rd of *March*, *A.* had sub-chartered the ship to *B.*, whose agent at *Hong Kong* had paid the freight to the agent there of the shipowner. Held, that *A.* was still liable to *C.* for the freight, and that *C.'s laches* in giving notice had not deprived him of his right. *Young* v. *Lindsay*. Page 405
2. A shipowner, in his written instructions to the captain, directed him, in case of emergency, to apply to certain firms abroad, "who would give him any assistance required." Held, that this did not authorize the captain to do anything not included in his general power and authority as captain. *Lyall* v. *Hicks*. 616
3. To authorize a captain to hypothecate the ship or freight for repairs, the necessity for such hypo-

thecation must exist; if, therefore, the agent of the shipowner in a foreign port has sufficient funds in his hands for the repairs, the captain cannot hypothecate. *Lyall* v. *Hicks.* Page 616

SOLICITOR AND CLIENT.

1. A solicitor received from his client a sum of money to pay off a mortgage. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest. *Re Cullen.* 51
2. A solicitor is accountable to his clients for the benefits which he may have derived clandestinely in transactions in which he was professionally engaged. *The Bank of London* v. *Tyrrell.* 273
3. A solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking house on a joint speculation. After its establishment the company purchased part of the premises for their banking house, not knowing that their solicitor was interested in it:—Held, that the solicitor must account to the company for all the profit made by him by the whole transaction; but that the stranger was under no such liability. *Ibid.*
4. The Respondent (a solicitor) was appointed a member of a committee of a company, with power to compromise two suits. He, with the approbation of his co-committee, compromised them and received the money. A summary application that he might pay over the money or be struck off the rolls was refused with costs. *Re Harvey.* Page 330

See PRIVILEGE.
TAXATION, 2.

SPECIAL CASE.

See COSTS, 6.

SPECIFIC LEGACY.

1. A testator bequeathed, specifically, all the money in the public funds "which he might be possessed of or entitled to at the time of his decease." He subsequently directed his country brokers to invest 5,000*l.* in Consols. They debited his account with the amount, and sent instructions to their broker to make the purchase, but no contract was entered into by the broker until five hours after the testator's death. Held, that the additional stock did not pass by the specific bequest, but fell into the residue. *Thomas* v. *Thomas.* 537
2. A testator bequeathed a debt of 4,000*l.* due from his brother to trustees for his brother for life, and he gave 1,000*l.*, part of the said sum of 4,000*l.*, to *A.*; 2,000*l.*, other part of the said sum of 4,000*l.*, to *B.*; and as to the sum

of 1,000*l.*, being the remainder of the said sum of 4,000*l.*, to sink into his general estate. He directed that if his estate should be deficient, the legacies should abate proportionably; and if it should be more than sufficient to satisfy the legatees, the legacies should be increased proportionably. At the testator's death, 2,120*l.* only remained due:—Held, that the legacies of 2,000*l.* and 1,000*l.* were specific, and ought to abate; secondly, that *A.* and *B.* were not entitled to have the whole 2,120*l.* applied rateably in satisfaction *pro tanto* of their legacies; but that a rateable proportion of the sum of 2,120*l.* ought to be attributed to the 1,000*l.* directed to sink into the residue: thirdly, that the legacies of 2,000*l.* and 1,000*l.* ought to be increased out of the surplus of the testator's estate, in proportion to the reduced amounts payable in respect of such legacies after the abatement. *Duncan* v. *Duncan.* Page 386

See BONUS.

SPECIFIC PERFORMANCE.

1. A landlord had, in 1827, agreed to grant his tenant a lease, but none had been granted, though the tenant had been in possession. On a bill by the tenant for specific performance, the landlord set up, by way of defence, that the tenant had committed waste. The Court directed the lease to be executed and antedated, and the question of waste to be tried at law. *Poyntz* v. *Fortune.* 393

2. Decree to compel directors in a joint-stock company to take shares subscribed for by them, and which were transferable, refused. *Buck* v. *Mallalue.* Page 393

3. An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, "except 37 acres thereof," which were not specified. Held, that the contract was not void for uncertainty, that the right of selecting belonged to the lessor, he having the first act to do; but that if a lease had actually been granted in the uncertain form of the contract, the right of selecting would then have belonged to the tenant. Held, also, that this right of selection must not be exercised oppressively, so as to interfere with the beneficial enjoyment of the rest of the farm. *Jenkins* v. *Green.* (No. 1.) 437

4. An incumbent agreed to grant a farming lease of the glebe, at a rent payable half-yearly. The Enabling Statute (5 & 6 *Vict.* c. 27) requires the rent to be reserved quarterly. Held, first, that the Court would not compel the lessee to take a lease reserving the rent quarterly. Secondly, that the Court would not, in the face of the act, approve of a lease reserving the rent half-yearly; but, thirdly, that if a lease reserving the rent half-yearly had actually been executed by the bishop and patron, it would, in favor of the tenant, have been a perfectly valid lease under the fourth section. *Jenkins* v. *Green.* (No. 2.) 440

See DAMAGES.
LEASE.
MORTGAGE, 1.
PARENT AND CHILD.
POWER OF SALE, 2.

STATUTE.

1. Trustees of the will of a testator, who died in 1845, had power to invest on "real securities in *England* or *Wales*, but not in *Ireland*." The Court declined advising the trustee to invest, under the powers contained in the 22nd & 23rd *Vict.* c. 35, s. 32, on a mortgage of Scotch estate. *Re Miles' Will.* Page 579
2. The 22 & 23 *Vict.* c. 35, s. 32, is not retrospective. *Ibid.*

39 & 40 *Geo.* 3, c. 98.
See THELLUSSON ACT.

3 & 4 *Will.* 4, c. 27.
See STATUTE OF LIMITATIONS, 2, 3.

5 & 6 *Will.* 4, c. 76, s. 71.
See CHARITY, 5.

5 & 6 *Vict.* c. 27.
See SPECIFIC PERFORMANCE, 4.

7 & 8 *Vict.* c. 32.
See BANK.

7 & 8 *Vict.* c. 110.
See PUBLIC COMPANY, 2.

8 & 9 *Vict.* c. 18, s. 80.
See LANDS CLAUSES ACT.

8 & 9 *Vict.* c. 18, s. 92.
See RAILWAY, 6.

10 & 11 *Vict.* c. 96.
See TRUSTEE RELIEF ACT.

15 & 16 *Vict.* c. 86, s. 44.
See PLEADING.

16 & 17 *Vict.* c. 137, s. 62.
See ENDOWMENT.

21 & 22 *Vict.* c. 27.
See DAMAGES.
RAILWAY, 1, 2, 3.

STATUTE OF LIMITATIONS.

1. When a fund is set apart to answer an annuity, the Statute of Limitations cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee, whose legacy was payable on the testator's death. *Bright* v. *Larcher.* Page 130
2. An improvident lease was granted by a charitable corporation to a trustee for the master. Held, after twenty years' enjoyment under it, that the rights of the Attorney-General to question its validity was barred by the Statute of Limitations (3 & 4 *Will.* 4, c. 27. *The Attorney-General* v. *Payne.* 168
3. The decision in *Attorney-General* v. *Wyggeston Hospital* (12 *Beav.* 113) questioned by Vice-Chancellor *Kindersley.* *Ibid.*
4. A testator charged his real estates with his debts, and he devised his *C.* plantation in trust to pay his debts. He died in 1834, and the produce of *C.* being in Court:—Held, in 1859, that the creditors were not barred as to the fund in Court, a trust having been created in their favor, but that they were barred as to the other real estates,

they having a mere charge thereon *Jacquet* v. *Jacquet*. Page 332

STAYING PROCEEDINGS.

When the matters in dispute have been disposed of by an independent proceeding, the Plaintiff may apply to stay proceedings, and the Court will then dispose of the costs. But where the suit has been dismissed against some of the Defendants for want of prosecution, the Court is no longer able to adjudicate as to the costs in the absence of the dismissed parties, and in default of prosecution, the bill will be dismissed in usual way, with costs. *Troward* v. *Attwood*. 85

STEWARD.

See SERVANT.

STOCKBROKER.

A stockbroker held bound to discover the names of the persons for whom he had purchased shares in a joint stock company which had neither been incorporated, chartered or registered, and which was regulated by no deed of settlement, and whose shares passed by delivery. *Re The Mexican and South American Company*. 474

SUBSTITUTIONARY LEGACY.

A testator bequeathed to his nieces 500*l*. owing to him from *A. B.*, and he directed that if his estate should not be sufficient to pay his legacies in full, they should (exclusive of that to his nieces) abate proportionably, and if it should be more than sufficient, they should be increased proportionably. The testator received the debt, and by a subsequent codicil, "in the place of the said intended legacy," gave his nieces 500*l*. to be paid out of his general personal estate. Held, that the second legacies were substitutionary, and subject to the same incidents, and that the nieces were not entitled to have them increased proportionably out of the undisposed of estate. *Duncan* v. *Duncan*. (No. 2.) Page 392

See ANNUITY, 6.

SURVIVORSHIP.

A testator gave some property to his wife for life and proceeded thus: —"At the decease of my wife, I leave the last-named sum to be equally divided between the families of my two brothers, viz. one-half to the widow and children of my deceased brother *John Bennett*, the widow, if surviving, to have an equal share with the children. Held, that the survivorship had relation to the death of the tenant for life and not of the testator; and, secondly, that the children took in joint tenancy. *Hesketh* v. *Magennis*. 395

TAXATION.

1. An order to tax the costs of an executor in a suit, including any

costs, charges and expenses properly incurred by him in the execution of the trusts of the will, does not include the costs of his defence to other suits instituted against him as executor. *Payne* v. *Little.* Page 83

2. A solicitor delivered a general estimate of costs due to him, without specifying the particulars. The client signed a memorandum agreeing to the statement, and requesting *A. B.* (to whom he had given his acceptance), to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery and taxation of the bill of costs, was dismissed with costs. *Turner* v. *Hand.* 561

TENANT FOR LIFE AND REMAINDERMAN.

When the title of a remainderman is clear, the Court will, at his instance, compel the remainderman to produce the title-deeds; but if his title be not clear, the Court will not, incidentally, decide in favor of the remainderman's title to the estate in a suit merely for the production of the title-deeds. *Davies* v. *Earl of Dysart* (20 *Beav.* 405) followed. *Pennell* v. *Earl of Dysart.* 542

See POWER OF SALE, 1.
RENEWAL.
TIMBER, 1.

TENANT IN COMMON.

See INFANT.

THELLUSSON ACT.

1. A testator gave a sum of stock, producing 180*l.* per annum, in trust to pay life annuities of 20*l.* each to seven persons, and at the decease of any, to accumulate his annuity, and after the death of the last annuitant, to divide the stock and accumulations amongst the surviving children of the annuitants. Held, that this was not within the exceptions of the *Thellusson* Act of "portions" for "children" of persons taking an interest under the will, and that the trust for accumulation beyond twenty-one years after the testator's death was void. *Drewett* v. *Pollard.* Page 196

2. The provision for payment of debts, excepted from the *Thellusson* Act, is not confined to debts existing at the date of the will or at the death of the testator. *Varlo* v. *Faden.* 255

3. A testator made a bequest of four shares in a newspaper, to one for life, but he directed the income, beyond 200*l.* a-year, to "be reserved, as a kind of sinking fund for the protection of those four shares." Held, that the accumulation was valid beyond twenty-one years from the testator's death, this being a provision for the debts of some "other person or persons" within the exception in the *Thellusson* Act. *Ibid.*

TIMBER.

1. *A.* was tenant for life without impeachment of waste, with remainder

to her issue in tail, with remainder to *B.* for life, with remainder to his issue in tail, with remainder to *B.* in fee. The Court directed some timber to be cut in the life of *A.*, and the produce to be invested. Both *A.* and *B.* died without issue. Held, as between the heir and executor of *B.*, that the timber money was realty, and belonged to the heir. *Field* v. *Brown.* Page 90

2. A tenant for life, without impeachment of waste, in order to preserve the timber, assigned for valuable consideration "all timber and timber-like trees then growing and being, and which should thereafter grow and be, upon the estate." Held, that this included both ordinary timber, and that which, by the custom of the county, was considered timber, and that the thinnings, and the right of determining what were proper thinnings, belonged to the grantees. *Gordon* v. *Woodford.* 603

TITLE DEEDS.

When a sale is directed, every party to the suit having the title deeds is bound to facilitate the sale. *Knott* v. *Cottee.* (No. 4.) 33

TRUST.

See DECLARATION OF TRUST.
MARRIAGE SETTLEMENT.
STATUTE OF LIMITATIONS, 4.

TRUSTEE.

See BREACH OF TRUST.
CHARITY, 4, 5, 6.
COSTS, 3.
DECLARATION OF TRUST.
INDEMNITY CLAUSE.
MARRIAGE SETTLEMENT.
PRODUCTION OF DOCUMENTS, 2.
TRUSTEE RELIEF ACT.

TRUSTEE RELIEF ACT.

1. A trustee is not, in all cases, justified in paying a trust fund into Court under the Trustee Relief Act, and where he does so without sufficient reason, he will be made liable for the costs of a petition for getting the fund out of Court. *In re Knight's Trusts.* Page 45

2. The children of *A. B.* were entitled to a specific legacy under a will, and to a portion of a residue under a subsequent deed of compromise. *C. D.* was both the legal personal representative and the trustee of the deed. The legacy was paid to the two children on their attaining twenty-one, in 1839 and 1843, in a suit to which the trustee was a party; but the other fund remained unpaid and in the funds until 1858, when, the two sons being in the Austrian Military Service, the trustee paid the fund into Court under the Trustee Relief Act. Held, that he was not justified in so doing, under the circumstances, and he was ordered to pay the costs of a petition by the sons to obtain payment out of Court. *Ibid.*

3. Trustees, on paying a fund into Court, under the Trustee Relief Act, retained a sum for their costs. On a petition to obtain the fund out of Court, the trustees obtained

the costs of their appearance, but all their costs were ordered to be taxed. *Re Hue's Trusts.* Page 337

UNCERTAINTY.
See WILL, 1.

VENDOR AND PURCHASER.
See POWER OF SALE, 2.
PURCHASE-MONEY.

VESTED INTEREST.
See PORTION.
VESTING.

VESTING.

1. Under a will, the shares of children became absolutely vested at twenty-one, but the fund was not divisible until the death or second marriage of the widow. The will directed that in case of the death of any of the children leaving lawful issue surviving, the share of the parent should go to the children of such parent. Held, that the gift over to the grand-children had reference to the period of division, and not to the period of the vesting of the children's shares, and that it then ceased to operate. *Beckton* v. *Barton.* 99

2. Bequest of 4,000*l.* to *A.* for life. and afterwards, if she shall "leave" any children, upon trust to divide it equally amongst all "such children," to be payable and become vested interests at twenty-one, and in case there shall be only one "such child" who shall attain twenty-one, then to pay it unto such only child. There was a power of maintenance during minority, and also of advancement, not exceeding "such presumptive share," and a gift over, if the daughter should "have" no child who should arrive at twenty-one. Held, by the *Master of the Rolls* and *Lords Justices* on appeal, that a daughter of *A.*, who attained twenty-one and married, but died in the life of *A.*, took no share. *Sheffield* v. *Kennett.* Page 207

3. A fund was settled on trust for the wife for life, and in case she should leave any issue living at her death, for the husband for life, and after his decease, upon trust to divide it amongst the children of the marriage "that should be *then* living on their respectively attaining the age of twenty-one years." And in case there should be no child, or of their all dying in the wife's life, to pay the fund to such person as the wife should by will appoint, and in default to the executors or administrators of the husband and wife, or the survivor of them. And in case the wife should survive her husband without leaving issue then living, to pay the fund to the wife. The wife died leaving children who had attained twenty-one, and the husband was still living. Held, that the limitation to the children remained contingent until the death of their father. *In re Wollaston's Settlement.* 642

VOLUNTARY SETTLEMENT.
Effect given to a voluntary assignment of a policy of assurance con-

taining an irrevocable power of attorney. *Pearson* v. *The Amicable Assurance Office and Others.* Page 229

WASTE.

See SPECIFIC PERFORMANCE, 1.

WIDOWS.

See CHARITY, 7.

WIFE.

A married woman, who had been separated for nineteen years from her husband, married the testator by the description of a widow. She had, about that time, heard a report that her husband was living and had made some loose inquiries, but believed he was dead. The testator having made bequests "to his wife," and the Court being of opinion that the evidence showed no fraud on her part towards the testator: Held, that she was entitled to the legacies. *In re Petts.* 576

WILL.

1. A testatrix gave her real estate in trust for her grandchildren (by name) and their issue, as *M. F.* should appoint, and in default of such appointment, upon trust for "my aforesaid nephews and nieces and their respective lawful issue, and also the issue (if any) of *M. F.* and their several and respective heirs and assigns for ever" as tenants in common. No nephews or nieces were mentioned in the will. *M. F.* died without appointing. Held, that there was no gift by implication to the grandchildren and their issue. Secondly, that the words "my aforesaid nephews and nieces" could not be read "my aforesaid grandsons and granddaughters." Thirdly, that the gift to the nephews and nieces were not void for uncertainty, and lastly, that they took in tail. *Campbell* v. *Bouskell.* Page 325

2 It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of it, unless it violates the sense. *Rhodes* v. *Rhodes* 413

3. A testatrix devised her real and personal estate to trustees, and directed her advowson of *F.* to be sold by them immediately after the death of *H.*, the incumbent. Held, that although on *H.*'s death the living must be filled before there could be a sale, still that the Court had no authority to direct the sale of the next presentation in the lifetime of *H.*, for the benefit of the residuary legatees. *Bristow* v. *Skirrow.* (No. 2.) 590

See ABSOLUTE INTEREST.
ANNUITY, 1, 2, 3, 4, 6.
BASTARD.
BONUS.
BREACH OF TRUST, 1, 2.
CHARGE ON REAL ESTATE.
CHARITY, 1, 3, 7.
CLASS.
COPYHOLDS.

See DESCENDANTS.
DEVISE.
DONATIO MORTIS CAUSA.
ELECTION.
EXECUTOR.
EXONERATION.
EXTRINSIC EVIDENCE.
FURNITURE.
HUSBAND.
INTEREST.
ISSUE.
"ISSUE" READ "CHILDREN."
LEGACY.
LEGACY DUTY.
LEGATEE.
MORTMAIN.
PER CAPITA.
PORTION.
POWER, 4.
PRECATORY TRUSTS.
REFERENTIAL TRUSTS.
SATISFACTION.
SERVANT.
SPECIFIC LEGACY.
SUBSTITUTIONARY LEGACY.
SURVIVORSHIP.
See THELLUSSON ACT.
VESTING.
WIFE.

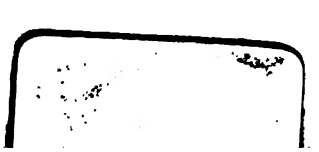
WINDING-UP.

See AFFIDAVIT OF SERVICE.
CONTRIBUTORY.
DISMISSAL FOR WANT OF PROSECUTION.
OFFICIAL MANAGER.

WITNESS.

Where a witness objects to answer, on the ground that he may subject himself to penalties, he must, in many instances, be the only one to determine on his liability; but when the facts disclosed raise a point of law as to his liability, the Court must decide it. *Re The Mexican and South American Company.* Page 474

See STOCKBROKER.

YOUNGER CHILDREN.

See PORTION.